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The L. B. Silver company, petitioner, v.



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**United States Circuit Court of Appeals
for the Sixth Circuit.**

THE L. B. SILVER COMPANY, PETITIONER,
v.
THE FEDERAL TRADE COMMISSION, RESPONDENT.

BRIEF FOR THE RESPONDENT.

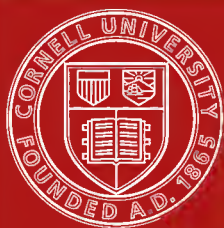
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Attorneys for Respondent, Federal Trade Commission.



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ERRATA SHEET FOR BRIEF IN L.B. SILVER CASE

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2	24	respondent's	petitioner's
2	29	respondent	petitioner
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5	21	respondent	petitioner
18	11	respondent	petitioner
54	26	along	alone
57	37	the	in
58	14	prices	prizes
64	28	" (quotation marks)	2
65	1	(insert " <u>ancestor</u> " after "O.I.C.P")	
67	8	respondent's	petitioner's
88	4	offering	offered
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United States Circuit Court of Appeals for the Sixth Circuit.

THE L. B. SILVER COMPANY, PETITIONER, }
v. }
THE FEDERAL TRADE COMMISSION, RE- }
SPONDENT. }

BRIEF FOR THE RESPONDENT.

This is an original petition to review the findings and an order entered by the Respondent, The Federal Trade Commission, against the Petitioner, The L. B. Silver Company, an Ohio corporation, commanding the Petitioner to Cease and Desist from certain unfair methods of competition in commerce. The Respondent's findings and order were based on its complaint filed on April 3, 1920, and on the Petitioner's answer, and upon hearings and oral argument made before the Commission.

THE CASE.

The complaint, to be found on pages 385 to 388 of the petitioner's "Record", after setting out the jurisdictional facts as to interstate commerce charges that the said company falsely represents throughout the United States that it is a breeder of hogs, which it characterizes as Ohio Improved Chesters or O. I. C. or Famous O. I. C. hogs; that it has falsely represented and published, and does still falsely represent and publish, said Ohio Improved Chesters or O. I. C.'s as a breed of hogs separate and distinct from and

superior to a breed known as the Chester White hogs, and that to lend color to said false representations, the said company has at various times stated that it would sell Chester White hogs at a price substantially less than the price for which it advertises to sell O. I. C. hogs, and that the said company usually endeavored to induce those ordering the Chester Whites at such less price to revoke their order and to accept in lieu thereof its O. I. C. hogs at a much increased price, and that when such prospective customer insisted on receiving Chester White hogs as advertised, the said company would either refuse to deliver on the ground that it had discontinued breeding Chester White hogs, or would sell and ship pigs of inferior type but of the same breed, and many times from the same litter from which respondent was selling the alleged O. I. C. hogs.

The complaint further alleges in paragraph five that the petitioner has falsely represented and published, and now falsely represents and publishes, that the said alleged breed of O. I. C.'s is not susceptible to cholera and other diseases; that there has been no cholera, foot-and-mouth or any other contagious disease in respondent's locality for over fifty years; that the O. I. C. hog escapes cholera, pneumonia and other diseases when others are swept away; that the genuine O. I. C. hog possesses a power to repel disease in a degree unknown to other breeds; that the respondent has bred O. I. C. hogs for 53 years and has never lost a pig with cholera or any other contagious disease, while, as a matter of fact, the said Ohio Improved Chester hogs or O. I. C.'s are no other than or different from Chester White pigs and are not peculiarly immune to or exempted from disease. It further alleges that during the times aforesaid the petitioner has by means of printed circulars, letters and other communications falsely represented that it had procured greatly reduced express rates on its live stock; that the express companies had agreed to give stock shipped by petitioner special rates; that during the times alleged in paragraph 3 thereof,

the petitioner represented and asserted that two of petitioner's alleged breed of O. I. C. hogs weighed 2,806 pounds, such representations being so made and asserted as to mislead a prospective purchaser to believe that two O. I. C. hogs were then in existence or recently had been in existence weighing 2,806 pounds, whereas said representation referred to hogs which are alleged to have existed in the year 1868.

The petitioner itself filed an answer in the form of a letter dated May 4, 1920, formally denying all charges made in paragraphs 3, 4, 5 and 6 of the complaint, and thereafter the attorneys for the petitioner filed an amended answer. In the first answer the petitioner admitted the jurisdictional facts as to interstate commerce by itself and by others, but by the amended answer it stated it was without knowledge as to whether others are engaged in breeding, dealing in and selling throughbred hogs in interstate commerce and therefore denied that they were so engaged. In the second paragraph of the amended answer, the petitioner admits that it advertised that it is a breeder and sets up alleged ground for so considering itself. As the Commission found that the said company is a breeder, the issue raised by this paragraph of the amended answer is immaterial. In paragraph 4 the petitioner admits that it has during the times alleged in the complaint and by some of the methods enumerated therein replied by the Ohio Improved Chester or O. I. C. is a breed of hogs separate and distinct from Chester Whites and that said breed is superior to the Chester White breed and that said representations are true; that since about the 1st day of December, 1918, it has voluntarily and permanently discontinued all advertisements and representations that it would sell Chester White hogs at a price less than that for which it would sell O. I. C.'s or at any price whatsoever and that such advertisements and representations were voluntarily and permanently discontinued by it. In paragraph 5, the petitioner denies that it published that the O. I. C.'s are not susceptible to hog cholera

and other diseases, and alleges it has represented that the O. I. C.'s are less susceptible to cholera and other diseases than some other breeds of hogs and that it would not guarantee its hogs to be immune from cholera and other diseases and that the said representations are true. It admits that it has represented that there has been no cholera, foot-and-mouth or other contagious disease in petitioner's locality for over 50 years and alleges that the representation is true. It also admits that it has represented that the O. I. C. has escaped cholera in sections where others have been swept away or words of similar import and alleges the representations to be true. It denies that it has made any representations in regard to the O. I. C. hog escaping pneumonia but admits that it represented that the genuine O. I. C. hogs possess a power to repel disease to a degree unknown to other breeds; and that the petitioner and its predecessor have bred O. I. C. hogs for 53 years, and have never lost a pig with cholera or any other contagious disease, and alleges that the said statements are true. Respondent denies that the Ohio Improved Chester hogs or O. I. C.'s are not different from Chester White hogs, and alleges that said Ohio Improved Chester hogs or O. I. C.'s are a breed separate and distinct from Chester White hogs; and the respondent closed the said paragraph by stating its version of the history of the origin of the O. I. C. hogs. In paragraph 6, the petitioner alleges that since the first of the year of 1918, it voluntarily and permanently discontinued any representations to the effect that it could secure reduced express rates on its live stock or that the express companies had agreed to give stock shipped by petitioner special rates. In paragraph 7, it admits that it made representations that two of the O. I. C. hogs weighed 2,806 pounds, but denied that such representations were made as to mislead a prospective purchaser in any way whatsoever; but asserts that this method of advertising has been long since voluntarily and permanently discontinued. In paragraph 8, the respondent denies that the repre-

sentations referred to in paragraphs 3, 4, 5 and 6 of the complaint are false, and denies that the said representations by petitioner were made, knowing them to be false or with intent that prospective purchasers of thoroughbred hogs should be misled but admits that the purpose of any advertising which petitioner may have done was to induce purchasers of thoroughbred hogs to purchase stock from petitioner and alleges this is the avowed purpose of all advertising and closes this paragraph by denying each and every allegation of the complaint wherein not specifically admitted to be true.

The issues being thus joined, testimony to the extent of 3222 typewritten pages was taken before an examiner and several hundred exhibits put in evidence and at the conclusion thereof briefs were filed by both the Commission and the respondent and the case was argued before the Commission.

Thereafter and on the 12th day of September, 1921, the Commission made its findings of fact and conclusion thereon which was to the effect that the respondent, the L. B. Silver Company, had violated the Federal Trade Commission Act. Thereupon and on the same day, the Commission issued an order requiring the said company to cease and desist from such violations. Subsequently and on December 5, 1921, the Commission modified their first order as to its paragraph numbered 1, and the material parts of this second and final order are as follows:

“NOW, THEREFORE, IT IS ORDERED, that the respondent, The L. B. Silver Company, its officers, directors, agents and employees CEASE AND DESIST from representing, in interstate commerce, to the public, by circulars, pamphlets, catalogues, trade journals, periodicals, newspapers or otherwise:

1. That the so-called Ohio Improved Chesters, or O. I. C.'s, or Famous O. I. C.'s are a breed of hogs separate and distinct from the Chester White breed of hogs;

2. That it has no Chester White pigs when in fact it has Chester White pigs though called by it O. I. C.

pigs; or that it has Chester White pigs and O. I. C. pigs as if the latter were a different and more valuable breed, when in fact they are one and the same breed; or that it has no Chester White pigs with which to fill orders for Chester White pigs, at its quoted prices or otherwise, when in fact it has Chester White pigs though called by it O. I. C. pigs; or that it has discontinued to breed Chester White pigs, when in fact it is continuing to breed them though designated by it O. I. C. pigs.

3. That the so-called O. I. C. pigs, as a breed, or otherwise, are not liable to cholera, foot-and-mouth disease, tuberculosis, and other contagious diseases; that there has been no cholera, foot-and-mouth disease, tuberculosis or other contagious diseases in respondent's locality; that the O. I. C. pigs possess a power to resist disease in a degree unknown to other breeds; that in localities where contagious diseases have swept off the dark and black hogs the O. I. C.'s were unaffected; from in any way representing to the public that the O. I. C. pigs are more resistant to disease than are other breeds of hogs;

4. That in the shipment of live stock the respondent enjoys, or has enjoyed, either or both, from express companies rates of transportation lower than the rates granted to other shippers of live stock by the said express companies.

5. That two of its hogs weigh 2806 pounds, that such hogs are in existence, that their progeny is for sale by the respondent."

THE FACTS.

I. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDINGS OF FACT AND ORDER ENTERED THEREON BY THE COMMISSION.

II. PARTICULAR STATEMENTS OF FACT IN PETITIONER'S BRIEF CONTROVERTED OR EXPLAINED.

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THE FACTS.

I. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDINGS OF FACT AND THE ORDER ENTERED THEREON BY THE COMMISSION.

From the brief of the petitioner it is impossible to say whether this appeal includes an attack upon the findings of fact made by the Commission. The brief states, in its opening sentence, "this is a petition to review findings and an order to desist made by the Federal Trade Commission against the L. B. Silver Company." It has, therefore, been thought better to set forth at this point in the Commission's brief an outline of the facts showing that the findings of fact and the order of the Commission rested upon substantial evidence. This showing is arranged as follows:

OUTLINE OF THE EVIDENCE.

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A—THE OHIO IMPROVED CHESTER, OR O. I. C. SWINE AND THE CHESTER WHITES ARE ONE AND THE SAME BREED. AND BOTH ARE KNOWN TODAY AS CHESTER WHITES. THIS IS SHOWN BY THE FOLLOWING FACTS.

(a) *The history of the breed called Chester Whites and that of the so-called Ohio Improved Chesters or the O. I. C.'s is the same.*

In the early part of the nineteenth century there existed scattered about in Chester and Delaware counties, in Southeastern Pennsylvania, large white coarse pigs of no particular breed name. L. B. Silver, "History of the O. I. C.", Com. Ex. No. 3, and Prof. Plumb, Types and Breeds of Farm Animals, "The Chester White", page 737, Com. Ex. No. 405. It has been assumed by careful swine historians, who have made considerable research in this country and in England, that the ancestors of these common native white swine "were brought over by early colonists, possibly at the time of William Penn," Prof. Plumb, Types and Breeds of Farm Animals, Com. Ex. No. 405, page 737, Prof. Gay, page 665 of Record.

Subsequently and about 1820, a sea-captain, named Captain Jeffries, of Westchester, Pennsylvania, went to England and brought back with him a male white pig from the estate of the Duke of Bedford, Bedfordshire, England. Prof. Plumb, Types and breeds, page 737, Com. Ex. No. 405, Carl Silver, pages 2519 and 2906, et seq. of the Record. A town called Woburn was at that time, and is now, a market town in the northern parliamentary division of Bedfordshire, and Woburn Castle was the residence of this Duke of Bedford.

This boar which was brought over by Captain Jeffries, has therefore, because of the place from which Captain Jeffries got him, been sometimes said to be of Bedfordshire or Woburn breed. L. B. Silver, "History of the O. I. C." Resp. Ex. No. 3, Prof. Plumb, "Types and Breeds", Com. Ex. No. 405,

page 737. The fact is, however, that, though this boar was obtained by Captain Jeffries in Bedfordshire, it was actually of the breed known as the Large White Yorkshire. Carl Silver, page 2519 and page 2906 of the Record, Prof. Plumb, page 1488 of the Record, and see also page 178 in the Book of the Pig, by Long, and Prof. Gay, 665, et seq. in the Record.

This Large White Yorkshire breed is now generally known in England as the Large White breed. Prof. Plumb, page 1635 of the Record. Carl Silver, as President of and as a witness for the Respondent, in his testimony calls the breed the Large White or the Mammoth White. The Mammoth White is the same as the Large White breed. Carl Silver, page 2514 of the Record, citing also from Resp. Ex. No. 62, at pages 200, 201. "The Sheep and Pigs of Great Britain", J. Coleman, Published by Field Office, 1877. See page 2515 of the Record. This boar brought over by Captain Jeffries was a Large White, page 2519, et seq. of the Record, and a type of Yorkshire, testified Carl Silver, as President of and as witness for the Respondent, page 2906 of the Record. The names Mammoth White and Large White are synonymous. Carl Silver, page 2577 of the Record. The names "are synonymous to me" testified Carl Silver at page 2578 of the Record. This boar, "which was retained by Captain Jeffries, had been a prize winner in England and used on the old native white type in Pennsylvania, had a distinctly refining influence. This Jeffries boar was white, though he had bluish or blackish skin spots, a broad back, excellent hams, short legs and a refined head with droopy ears." Prof. Plumb, Types and Breeds, Com. Ex. No. 405, page 737.

Following the Jeffries importation, Harvey Atwood, of Cumberland County, Pennsylvania, "where I lived", Prof. Gay, page 665 of the Record, imported some white Chinese stock from England. Prof. Plumb, Types and Breeds, page 736. Prof. Gay, page 665 of the Record. "The stock from Jeffries

and Atwood were blended together along with the common native white pigs of the region and from this has come the first strain, if it may be so termed, of the Chester White blood." Prof. Plumb, Types and breeds, page 737, and second paragraph, page 4, Respondent's Exhibit No. 58, written by L. B. Silver himself. Long, The Book of the Pig, page 178, et sequitur.

The breed resulting from the matings of the old native common white pigs of Chester and Delaware Counties with the Bedfordshire boar of Captain Jeffries, and the Chinese stock of Harvey Atwood, were, by agreement of the hog breeders of those counties, called "Chester County White," Prof. Plumb, Types and Breeds, pages 738-9, and by others, "Chester County breed." See L. B. Silver's Article, "Hints to Stock Breeders," second paragraph, page 4, Respondent's Exhibit No. 58, and first full paragraph of page 5, Commission's Exhibits Nos. 501, 530. Respondent's witness Wade called them "Old-fashioned or original Chester Whites," page 1979 of the Record, while the O. I. C. Swine Breeders' Association in its literature calls them the original Chester White. See Commission's Exhibit No. 408, page 3.

These old-fashioned or original Chester Whites possessed so many desirable qualities and offered such opportunities for further development that from early days they were sought for by many white pig breeders throughout the United States, particularly in Ohio, Indiana and Illinois, and these breeders started in to further improve these "old-fashioned or original Chester Whites."

One of these breeders was L. B. Silver, who established the business of the respondent, and, since he bred them in Ohio, he called his, Ohio Improved Chester, see page 2770 of the Record. Jacob Biggle, in The Biggle Swine Book, page 18, Commission's Exhibit from the Congressional Library, gives various other names to this improved type of Chester Whites. Minutes of the Tenth

Annual Meeting, Vol. 10, O. I. C. Record, Commission's Exhibit No. 15, 26 lines from the top, where The O. I. C. Swine Breeders' Association and the L. B. Silver Co., petitioner, say, "The O. I. C. Record is now the only Chester White Record having government certification."

Thus far in this brief we have described three kinds of white hogs, and because their names are similar, these three kinds must be carefully kept in mind and distinguished. They are:

(a) The "common native white swine" of Chester and Delaware counties in Pennsylvania, the ancestors of which were brought over by William Penn and his colonists.

(b) The Chester County Whites, produced by mating the above mentioned "common native white swine" to the large white Yorkshire or Bedfordshire boar of Captain Jeffries and to the Chinese pigs.

(c) The modern Chester Whites which are simply an improved type of the above named Chester County White breed, and which were produced by the mating of animals carefully selected from and entirely within this Chester County White breed.

It must now be borne in mind, in view of the claims of the petitioner, that the foundation stock which L. B. Silver used to produce his Ohio Improved Chesters or O. I. C.'s was nothing more than the Chester Whites already created by the mating of the common native white swine of Pennsylvania to the Large White and Chinese breeds, and further that these Chester Whites which formed the foundation stock of his Ohio Improved Chesters or O. I. C.'s were never at any time mated by him or by any one else to the Large White or animals of any other breed. This statement is emphasized in view of the fact that Carl Silver, as president of the petitioner, claims that in the improvement of the Chester Whites, and to create the O. I. C.'s, his father used the Large White.

The origin of L. B. Silver's Ohio Improved Chesters, sometimes called by him, and especially by his busi-

ness successors, the O. I. C.'s, page 2770-1 of the Record, is set out clearly and fully by the originator, L. B. Silver, himself. Its *first* history is found in a pamphlet by L. B. Silver, entitled "Hints to Stock Breeders," (1870), and marked in evidence as Respondent's Exhibit No. 58.

The *second* history was published in 1891. When the International O. I. C. Record Association, of which L. B. Silver was President, was in its first stages of organization, its Secretary, H. A. Jones, witness for the Commission, page 3100 of the Record, asked L. B. Silver to prepare a history of the origin of the O. I. C. Swine for publication in the first volume of the Association's record, see four lines from top of page 9, Volume A, International O. I. C. Record, Commission's Exhibits Nos. 501, 530, 229. L. B. Silver did so and sent it to the Secretary, and both Silver and his son Carl Silver, President of and a witness for this petitioner, okehed the printer's proof, see page 3102 of the Record, and the same was published in Volume A, International O. I. C. Record, pages 5 and 6, Commission Exhibits, Nos. 501, 530, 229. This second history is exactly the same as that in the pamphlet mentioned above, and published in 1870, save for eliminated irrelevant matter.

A *third* history was written by L. B. Silver, see Mr. Vernon's testimony, page 2219 of the Record, and printed on page 16 of Volume 1 of the O. I. C. Swine Breeders' Association Record, Commission's Exhibit No. 39 and Respondent's Exhibit No. 3, as an authentic history of the so-called O. I. C. breed and sanctioned by that Association, see Mr. Vernon's testimony page 2219 of the Record.

Finally, the November, 1911, number of the Breeder's Gazette, Commission's Exhibit 406, see R. p. 1469, in answer to an inquiry from a subscriber as to the origin of the O. I. C.'s, published a long statement over the signature of L. B. Silver, which was entirely harmonious with the three preceding articles. This article appears in full at page 1469, et seq. in the Record. None of these statements

of L. B. Silver have ever been discredited by the L. B. Silver Company, nor by Carl Silver, President of the Company, and son of L. B. Silver, until a short period before the time of the Post Office Investigations of 1916 and 1918, and the institution of the present action. Carl Silver does not deny that his father wrote this, page 2546 of the Record, and he never wrote to the Breeder's Gazette disputing the facts therein contained, page 2547 of the Record.

Thus, from 1870 to 1911, during a period of 41 years, L. B. Silver and his business successors, have published, over the signatures of the founder of the so-called O. I. C. breed of swine, a series of harmonious histories in all of which the statement is made that the Ohio Improved Chesters, or O. I. C.'s, are an improved type of Chester Whites created by careful selection and mating of Chester White animals only. Respondent's Exhibit No. 58, page 23.

Thus L. B. Silver, in his histories mentioned above, on the "Origin of the O. I. C. Swine," says:

"In order to give the origin of the O. I. C. swine, it will be necessary to give the history of the Chester County breed, which never was very clear. Some claim that a certain sea captain brought a large Bedfordshire boar from England, and that said boar was crossed on the native sows of Chester County, from which sprang the Chester county breed; others claiming that they are a cross of the best hogs in England with the Chinese or Siamese.

"In 1865, when the author was on a trip through the eastern States, looking over the various herds of thoroughbreds, he was emphatically informed, while in Albany, New York, that an old and respected citizen of Albany county, a few miles out of the city, was entitled to the credit of originating what is known as the Chester county breed of swine, but known in Albany as the white Hog. He further stated that some enter-

prising Chester county fellows had procured some of these white hogs, and propagated them in Chester county—some breeding them in their purity, others crossing them on the native Chester sows—and all that were bred in Chester county very soon became the Chester County Whites. It would appear that the respectable old gentleman of Albany county did not prosecute the breeding of the white hogs to any great extent, or else sold out entire to Chester county chaps, as the swine breeding community have not heard much from the old gentleman, nor of his ‘White Hogs’ as he chose to call them.—Commission’s Exhibits Nos. 501, 530, page 5, first two full paragraphs. Respondent’s Exhibit No. 58, page 4, second and third paragraphs.”

Then, after stating his method of selection and breeding, he says: “What I have hinted at will give a pretty correct idea of the ORIGIN OF THE O. I. C.’S. *First, the parent stock was selected with great care by the Author in person, in Chester County, from time to time, from the best herds, and as many as possible, in order to have as large a number as possible not akin.*”—second full paragraph, page 6, same exhibit—and finally, at the bottom of the same page, he writes “by careful selections and adhering strictly to the laws governing breeding, the valuable characteristics of the O. I. C. swine have become established so they are now known as a distinct breed.” He has used the word breed here in a loose sense, as is often done. See respondent’s witness Davenport, pages 2336–2338 of the Record. What he really means is a “type” of Chesters, as shown by his use of the word “type” on page 23 of respondent’s Exhibit No. 58.

These histories by L. B. Silver, so far as they go, are in harmony with what is taught by swine historians, by all professors of swine husbandry, and by all the authorities on the history of Chester

Whites, and, as they were not written in view of any litigation, but are the results of honest efforts to set forth accurately the origin of the so-called O. I. C. hog, it is fair to assume these statements are correct, and that the O. I. C.'s are nothing more than an improved strain of the old Chester Whites.

It is impossible to say, after reading these histories, that L. B. Silver regarded the Ohio Improved Chester as anything else than a pure-blood Chester White. See also respondent's Exhibit, No. 58, page 23, first full paragraph. And they were so regarded by his associates in business, see the four paragraphs of Secretary Jones' plan, page 7, Volume A. International O. I. C. Record, Commission's Exhibits Nos. 501, 530, and 229, and by his successor in the business, second and third full paragraphs, page 2, Commission's Exhibit, No. 28, petitioner's advertisement, and by the O. I. C. Swine Breeders' Association, see Minutes of the Tenth Annual Meeting of the O. I. C. Swine Breeders' Association, unnumbered page of Volume 10, O. I. C. Swine Breeders' Record, Commission's Exhibit No. 15.

The idea that the Ohio Improved Chester hog is really a breed separate and distinct from the pure-blood Chester White, is something that originated long after L. B. Silver died. It is nowhere found except in the literature of the promotion work and propaganda of the O. I. C. Swine Breeders' Association and in the advertisements of the L. B. Silver Company after the affairs of the L. B. Silver Company were in the hands and under the control of Carl Silver, and after that company began to feel the pressure of competition from other breeders of pure-blooded Chester Whites.

Mr. Frost and Mr. Wade, trustees of, and Mr. O. C. Vernon, Secretary, of the O. I. C. Swine Breeders' Association, all witnesses for the petitioner, were unable to point to a single authority other than their own advertising literature, which declared that the so-called O. I. C. hog was a breed separate and distinct from the pure-blooded Chester White. It

must be remembered that the hog native to Chester County, Pa., was known as a Chester White hog whose qualities, characteristics and type are decidedly different from those of the modern full-blooded Chester White, which was, as truly stated by L. B. Silver himself, on page 5, volume A of the International Ohio Improved Chester Record, a result of cross breeding with the common native white hogs of Chester County and imported hogs of other breeds. And, when the witnesses of the respondent testify that they can tell differences between the Chester White and the so-called O. I. C. breed, it must be remembered that they are always referring to the original native Chester County White hog, as admitted by some of their witnesses in the testimony, and *not* to the modern full-blooded Chester White. See pages 1777, 1828-9, 1850, and 1979 of the Record.

The petitioner in competition with Chester White breeders and sellers of Chester Whites, and to their commercial and financial disadvantage throughout the United States and foreign countries, claims and advertises, for the purpose of securing customers in those places, that the hogs it sells, and calls O. I. C. are a breed separate and distinct and superior to Chester Whites, whereas they are in truth and in fact all one and the same breed.

Contrary to all the authorities and historians of swine breeds and to the statements of L. B. Silver, the petitioner alleges in its literature and in the literature of The O. I. C. Swine Breeders' Association, of which it is a member, that the O. I. C. Swine are a distinct breed from the Chester Whites and originated "by crossing on the Chester White another breed of hog which was about what is now known in England as the Mammoth White." See first full paragraph, page 3, Commission's Exhibit No. 408. The fact is, however, that this "Mammoth White" is nothing more than Captain Jeffries Bedfordshire hogs. This is shown by the following.

On the last full paragraph of page 5 of respondent's amended answer the statement is made in effect that the English Mammoth is the same as the Large White Breed. Now the Large White Breed is the same as the Yorkshire. See James Long, *The Book of the Pig*, page 106 and bottom of page 112. Prof. Plumb, p. 1488-1635 of the Record, Prof. Gay, page 665-666 of the Record. And this Yorkshire is the same as the Bedfordshire hog. See Prof. Gay, page 565-666 of the Record. This is to say Silver's so-called Mammoth White is nothing more than the Bedfordshire hog.

Carl Silver, President of the petitioner, confirms this. He testified that one Jefferson Shriner, at present ninety-two years old, a Chester White breeder of Chester County, Pennsylvania, whom Silver seemed to rely upon, told Silver recently that he saw the boar Captain Jeffries brought over, and the boar was a type of Yorkshire. See pages 2906 et seq. of the record. Furthermore, in the second Post Office investigation of the petitioner, Silver said: "I would call your attention where you spoke of the Mammoth Whites there. It was a large breed of hogs from England that are now known as the Mammoth Whites, they were known then, I think, as the Bedfordshires. They were a hog with an ear which came right down over their eyes, loppy ears and a short nose. Did you hear my description?" On Silver's cross examination in this hearing he would neither admit nor would he deny that he so testified in the second Post Office investigation as quoted above.

We have then, from two places of the petitioner's own testimony the information, that L. B. Silver's so-called Mammoth White was the Bedfordshire, sometimes called the Large White Yorkshire or Large White. Hence if it is true, of which there is great doubt, that L. B. Silver ever did tell his son, Carl Silver, and Mr. Vernon that he crossed with the Mammoth White, which were Bedfordshires, to produce his Ohio Improved Chesters, it is evident that he

referred to the same breed that the originators of the Chester White breed had used to create the Chester Whites. And so by the petitioner's own witnesses the O. I. C.'s and Chester Whites have the same breed history. This is just what all the experts claim.

As a further identification, Carl Silver's own description of the hog, given in the quotation from him above, fits, as far as it goes, the type of the large Yorkshire fancied in those early days. "Large wide lop ears," James Long, "The Book of the Pig," page 108, second full paragraph, Coburn, Swine in America, page 50, Commission's Exhibit No. 429, and "turned up nose," Swine Husbandry, Pennsylvania Department of Agriculture, Bulletin, No. 307, Commission's Exhibit No. 13.

There is another fact which convinces many swine experts that the O. I. C.'s are only Chester Whites, and that is that for a period of seven years all the O. I. C.'s were recorded in The National Chester White Record and in other reputable Chester White Records.

For many years after the Chester White swine had established its breed identity there was no record in which the pedigrees of the individual hogs could be recorded. "In 1884 there was organized at Eminence, Kentucky, the National Chester White Swine Record Association, but after a few years the headquarters were moved to Westchester, Pennsylvania, where it is still located," Plumb, Types and Breeds, page 748. "In 1885 the Chester White Record Association was organized in Ohio, and later this became known as the 'American Chester White Record.'" Plumb, Types and Breeds, page 748. In these two records and until about 1891 were recorded the pedigrees of all Ohio Improved Chesters or O. I. C.'s including all the pedigrees of L. B. Silver's hogs, together with all other Chester Whites.

In that year, 1891, H. A. Jones conceived the idea of creating a new record for the Chester Whites (see Carl Silver's testimony, pages 2593, et seq. of the

Record) and of making the O. I. C. type of Chester White so superior to other Chester Whites that it would receive a separate classification at fairs and expositions, see Preface of Volume A, International O. I. C. Record, Commission's Exhibit No. 530, 229, and would have an improved record for the "full-blood Chester White hog." See Secretary Jones' plan, page 7, twenty lines from the top, Commission's Exhibit No. 530, 229. But the hope expressed in that paragraph of the preface beginning with the eighth line from bottom was for reasons given later on never fulfilled. See page 3101 of the Record.

Accordingly, and in 1895, The International O. I. C. Record Association was incorporated. The reason for the creation of this first O. I. C. record is stated by a witness for the Commission named H. A. Jones, the first secretary and the organizer of the International O. I. C. Swine Breeders' Association on page 7, 5th full paragraph, Com. Ex. No. 229, 530, to be as follows:

"We have no Record of the Chester White hog which can have a separate division on all State and County fair lists. We are obliged to place the full blood Chester White hog in competition with any which may see fit to enter, regardless of a pedigree or any guide by which to judge the value and breeding of any animal, by the relative points on a score card, with all of same blended into a shapely and well proportioned hog.

"We have no Record which is National, except in name only. The present National has been split up and divided; one branch being at West Chester, Pa., and one at Indianapolis, Ind.

"We have been recording the Ohio Improved Chester Swine in the National Record. Do we have entire satisfaction in so doing? Well, no; and for the following reason: The original pedigree is not retained by the Secretary for reference in case of an appeal on a contested

case in relation to erroneous decisions of judges at exhibitions or otherwise. This should be done, for various reasons which can be discussed at other times, when we have a larger membership."

Thereafter all the pedigrees of the O. I. C. swine, bred by L. B. Silver, The L. B. Silver Co. and others, which formerly were recorded in the National Chester White Record, were recorded in the International O. I. C. Record. Page 3106 of the Record. However, the promoters and incorporators of the International were unsuccessful in accomplishing their purposes, chiefly because L. B. Silver did not fulfill the International's requirements looking to that purity of type and breed which was demanded. See page 3106 et seq. of the Record, and the letters by Carl Silver, read into the record on page 3115. Consequently the International Record passed into the hands of a receiver and its effects into the hands of witness Jones as trustee, page 3131 of the Record.

The witness Jones declares in his testimony, pages 3110, et seq. that the pedigrees of Carl Silver were in such bad condition that he became suspicious that Carl Silver and his father were doctoring the pedigrees so as to show purity of blood and correct tracing. He then required from Carl Silver and L. B. Silver identification of all the animals that Silver had recorded in Volume A of the International O. I. C. Record Association and sent him some letters of inquiry, together with blanks to fill out for each hog and for information if the hogs were alive, where those hogs could be seen and examined. (p. 3106). This Carl Silver, on his cross-examination, would not admit to be the fact, neither would he deny it. (2910) But note that when he is asked the question "You never returned the vouchers showing the existing or disposal of the animals inquired about" (2910) he answered, "No, why should I. (2911) I threw them away, because it was foolishness." (2911)

Thereafter and in 1897 L. B. Silver, Carl Silver, President of the petitioner, O. C. Vernon and others,

incorporated The O. I. C. Swine Breeders' Association, principally, it would seem, for the advancement of the business of The L. B. Silver Co., and has continued up to the present time. It has and is contributing money for this defense, and will continue to do so. Page 2194 of the Record.

Now all the pedigrees of all the hogs registered in the International O. I. C. Record and in The O. I. C. Swine Breeders' Association Record trace back into the National Chester White Record or some other Chester White Record. Page 2175 of the Record. This fact alone establishes beyond controversy to all unprejudiced persons that the so-called O. I. C.'s are Chester Whites. There is no parallel case in all swine record history where all the pedigrees of one breed of hogs have been registered in the record books of another breed association. All the authorities are agreed upon that. The fact that the pedigrees of all the hogs recorded in the International O. I. C. Record and in the O. I. C. Swine Breeders' Association Record trace right back, all of them, into the National Chester White Record or other Chester White Records is of itself conclusive evidence that the O. I. C.'s are Chester Whites.

We now come to another line of facts which are of probative force in establishing the proposition that the O. I. C.'s are Chester Whites.

The Ohio Improved Chesters or O. I. C.'s as sold by L. B. Silver were only the selected stock of his herds, the balance being sold as straight Chester Whites. L. B. Silver states, page 23, Respondent's Exhibit No. 58:

"Ohio Improved Chesters, which we place in our First Class, we claim to have NO SUPERIORS IN AMERICA. Although the parent stock is of the choicest selections of Chester County, made by ourselves, with great care, and by judicious breeding and careful weeding, we have succeeded in establishing a type, the fame of which is rapidly becoming world-wide."

“Our Second Class is THOROUGH-BRED CHESTERS, and will compare with the pigs shipped promiscuously from Chester County. The First Class is from stock of the most PERFECT TYPE, which are of very rapid growth, fatten at any age, and grow to an enormous size,” etc.

This advertisement shows that the Ohio Improved Chesters are Chester Whites, and that they and the pigs he sold as Chester Whites are out of the same litters is indicated by the testimony of Whinnery in early times and Walton of today.

Furthermore, from the very beginning of L. B. Silver's business, through all that of his successors therein, and even at the present time, L. B. Silver, Carl Silver and The L. B. Silver Company have purchased and used pure blooded Chester White swine for mating to animals in the Silver herds, to produce the pigs they sold to their customers as pure bred O. I. C. swine. The pedigrees of these pure blooded Chester Whites so purchased and so used, or their ancestors, are all recorded in the first volumes of The National Chester White Swine Record, American Chester White Record, or other Chester White Records. These facts are established by the testimony of witnesses Whinnery, Jones, Silver and others. And the facts of their testimony are here taken up in their chronological order.

Long before the petitioner was incorporated in 1894, and from an early period in the business, L. B. Silver, bought Chester White pigs from Chester White breeders to use for breeding the pigs sold by him. The best offspring Silver sold as Ohio Improved Chesters and the balance as Chester Whites. See Respondent's Exhibit, No. 58, Top of page 23. That L. B. Silver sold Ohio Improved Chesters and Chester Whites is admitted by his son, Carl Silver. Page of the Record. How L. B. Silver operated his business and how it is that the Ohio Improved Chesters (O. I. C's) are the same as Chester Whites is shown by the testimony of Willis Whinnery. Willis Whin-

nery was born near Salem, Ohio, in 1863, and has lived there practically all his life. He was publisher of "Whinnery's Swine Advocate"; was a trustee and member of American Chester White Record Association, page 1428 of the Record, a breeder of Chester White hogs and for many years won prizes on these pigs at various state fairs and other exhibitions. About 1885 Mr. Whinnery began raising hogs for L. B. Silver.

"It was possibly 1885 or 6 or 7, I don't remember the exact date, that my first experience dates from. The first bunch of Chester Whites that I ever fed was a bunch that I secured from a neighbor, Morris Votaw. He lived about two miles from me. I met him on the road one day and entered into conversation with him, and I noticed that he had a bunch of hogs in his wagon. I asked him what he was doing with them and he said he was taking them home. He made the statement that he had been to Damascus to deliver them to an agent of the L. B. Silver Co., and I believe that the agent's name was Mr. Elliott and that they were rejected on account of the fact that they were not in suitable condition. He asked me if I would buy them of him and we finally struck up a deal and I bought the bunch. * * * I took them home and divided them into two bunches. I was in the dairy business at that time and had plenty of skim milk, and I commenced feeding them rather liberally. * * * They made rapid gains, improved very fast. I was wanting to get the money out of them so I wrote to Mr. Silver, (L. B. Silver) then the manager of the L. B. Silver Co., of Cleveland, told what I did and asked him if he could use them. Some correspondence ensued in regard to it and he finally asked me to deliver five of them, I believe it was, to the agent at Garfield. I did so, and they were reported O. K.,

and he wrote back for me to prepare the balance of them for shipment, which I did and I believe he took all of them. At that time I did not know anything about the pedigree business. I was inexperienced entirely. There was no distinguishing mark on these pigs. Page 1410 of the record. I supposed they were from two or three litters, although I did not ask the man that I remember, and in fact he did not give me any information in regard to them at all about their breeding only that he was raising them for Silver. I did not have any data in regard to their parentage whatever; but those pigs were used for breeding purposes." Page 1411 of the Record.
 * * * "They were all Chester White pigs
 * * * and the man I got them of said they were Chester Whites." Page 1412 of the Record.

"Later on L. B. Silver asked me to go into breeding operations and raise pigs for him, and I went into the eastern part of the county and selected some down there. There were some, I believe, from Mr. Campbell that were known as 'Josie' and 'Hattie.' * * * There was a boar pig that I got from Mr. Grimes, and he was later known as 'Centennial VII.' There was a sow pig secured from some place at the same time, by the name of 'Stella.' Those were four animals that I first started a foundation herd with." All were Chester Whites. Page 1414 of the Record.

Witness Whinnery then began breeding pigs for L. B. Silver under the following terms:

"He required me to sign up a contract that I would furnish him pigs. * * * Part of the conditions were that he was to pay me so much a pound for them up to a certain weight and the pork price for whatever they weighed over that."

The hogs named above, Josie, Hattie, Stella and Centennial VII, became recorded later in the record volumes of the American Chester White Record Association. Page 1414 of the Record. The sow Hattie is mentioned, page 72, volume A of the American Chester White Record. Commission's Exhibit No. 404 as the dam of Queen Mary, dam of Crooked Cudhay, No. 3035. Josie is mentioned on page 73 of this volume, as the dam of Orphan Boy No. 3049. Page 1417 of the Record. Centennial VII, on page 72 of this volume, is the grandsire of the female side of Perfection Model, No. 3033. He is also mentioned as an ancestor of many other pigs recorded in this volume. There were also many other famous Chester White Pigs that witness Whinnery was using for breeding the pigs that L. B. Silver was selling as Ohio Improved Chesters, that is O. I. C's. For instance, Orphan Boy, No. 3049, farrowed July, 1892. Note that this famous boar is stated on page 73 of this volume A, Commission's Exhibit No. 404, as bred by Willis Whinnery, Salem, Columbiana County, Ohio, owned by the L. B. Silver Company, Salem, Ohio, sire, Gilt Edge 2285; he by Joe V, and out of Nellie II, both bred by C. M. Walter. Dam Josie, 4454; she by Duke of Oakland, and out of Buttercup, bred by T. Walter, both pure bred Chester White breeders of Chester County, Pennsylvania. Page 1417 of the Record. This Orphan Boy bred by Whinnery, was afterwards bought by L. B. Silver from him and used as a breeding animal. Orphan Boy's progeny was sold by Silver to other people. An instance of this is found on page 89 of Commission's Exhibit No. 404, Chief Templar, No. 3299, bred by L. B. Silver Company, Cleveland, Cuyahoga County, Ohio, sold to H. S. Nelson, Coe Ridge, Cuyahoga County, Ohio, sire Orphan Boy, 3049, he by Gilt Edge, and out of Josie. He was a Chester White. Page 1422 of the Record.

Gilt Edge, No. 2885, Page 73 of Commission's Exhibit No. 404 is another boar Whinnery bought of C. M. Walters, a Chester White breeder of Chester

County, Pennsylvania. Gilt Edge is the sire of Orphan Boy. He was by Joe V, and out of Nellie II, both bred by C. M. Walter, page 1422 of the Record. Duke III, on page 73 of Commission's Exhibit No. 404, is another pig Silver bought from some place in the eastern part of the county for breeding purposes. He had been shipped in from Chester County, because he was bred in Chester County. His pedigree is Genesee, No. 3051, Duke III, No. 3005, he by Duke of Oakland, out of Laura, both bred by C. M. Walters.

The amount of breeding done at this time by witness Willis Whinnery for the L. B. Silver Co. is shown on page 325 of Commission's Exhibit No. 404, which gives the registry number of 787 registered Chester White hogs belonging to and recorded by Willis Whinnery.

The hogs mentioned above were some of the hogs from which the witness was raising pigs under contract for L. B. Silver, as President of the L. B. Silver Co. Page 1417 of the Record. These hogs the L. B. Silver Co. was calling O. I. C.'s and selling them as O. I. C.'s to its customers. Mr. Whinnery knows this because—

“at the time the progeny of the animals recorded in here that we are speaking of here were sold I was acting as his agent, and the instructions came to me for the shipment of these pigs; some of the cards were marked ‘O. I. C. Swine,’ and some were marked ‘Chester Whites.’ They were shipped from these animals that I have been referring to here. These cards had an order on; the man's address and what was to be sent to him.” Page 1418 of the Record. “I had no instructions to differentiate in breed at all. *My instructions were to select the best pigs to fill the orders for O. I. C.'s and if there was any inferior pigs, that was suitable at all, why to fill the orders for Chester Whites out of them.*” Page 1419 of the Record. “My instructions was that when orders came in—there was some Chester White

orders and some O. I. C. orders,—that is, there was cards bearing those instructions—as I stated before, the instructions were to select the better animals for the O. I. C. shipments. He also personally told me his reasons for it, that he got a higher price for them and that he did not care to send out the best pigs for Chester Whites. There was a good share of them that was bred on my own farm and then I acted as his agent at that time and neighboring farmers were raising white pigs, and they were instructed to mate them and grade them and ship them. I was not very far advanced in the theory of breeding nor in the pedigree business. I knew but very little about it. Up to 1890 or 1891 I had not recorded any.”

This testimony of Whinnery accords with the statement of L. B. Silver in Respondent’s Exhibit No. 58, page 23, where he advertises two types of Chester Whites. The first class which he called “Ohio Improved Chesters”, and the second class “Thorough-Bred Chesters”. This advertisement of L. B. Silver was as follows:

“OHIO IMPROVED CHESTERS,

Which we place in our First Class, we claim to have NO SUPERIORS IN AMERICA. Although the parent stock is of the choicest selections of Chester County, made by ourselves, with great care, and by judicious breeding and careful weeding, we have succeeded in establishing a type, the fame of which is rapidly becoming world-wide.

“We are shipping them into all of the States, and they are rapidly gaining favor in the Canadas and other British Provinces.

“Our Second Class is THOROUGH-BRED CHESTERS, and will compare with the pigs shipped promiscuously from Chester County.

The First Class is from stock of the most PERFECT TYPE, which are of very rapid growth, fatten at any age, and grow to be an enormous size, spring pigs making very respectable large hogs the following fall, thereby saving wintering. Another great advantage we claim for the Ohio Improved Chesters is, that they will make a GREATER AMOUNT OF PORK FOR THE FOOD CONSUMED THAN ANY BREED KNOWN."

The progeny of many of these hogs were exhibited by witness Whinnery at the various fairs. At the Akron, Ohio, fair, witness had the boar Centennial VII and the sows Hattie and Josie and the produce of Hattie and won a share of the premiums. Page 1424 of the Record. These were all exhibited as Chester Whites, and their progeny were hogs that he was selling to the L. B. Silver Co. for the purpose of supplying orders for O. I. C. hog. Page 1426 of the Record.

The witness noticed that a good many of the breeders seemed cold and unfriendly toward him and on asking one of these breeders "he very kindly told me that I was in wrong. He said that the regular Chester White breeders did not think that the L. B. Silver Co. was doing business on business principles, or on fair principles." After this, witness Whinnery, convinced that L. B. Silver was not acting fairly to his customers and competitors, left the employment of L. B. Silver and began business on his own account as a Chester White breeder.

Witness Whinnery was a member of the Executive Committee of the American Chester White Record. On page 324 of Volume 6 of that Record, in the Index of Breeders, L. B. Silver's name occurs, with the credit of these three animals, and the L. B. Silver Co. with the credit of thirty animals, all of them Chester Whites. Page 1429 of the Record. Some of these animals and their progeny were sold by L. B. Silver for breeding and the balance were retained for breeding O. I. C.'s. Page 1430 of the Record.

The credibility of witness Whinnery was sought to be impeached by Carl Silver and one John H. Hinchliffe, a small town office holder and breeder of O. I. C.'s for the petitioner. However, Fred R. Pow, President of the First National Bank, and J. W. Kuhl, who knew Whinnery for 27 years; F. C. Koppock, Manager of Sloan Supply Co. who has known Whinnery for the last 10 years, and Joseph E. Walton, former stock raiser, who has known him for over 50 years, all prominent business men of Salem, Ohio, and E. Z. Russell, Head of Swine Husbandry for the U. S. Dept. of Agriculture, each testified that Willis Whinnery was a man whose reputation for truth and honesty was good, very good.

The testimony of Willis Whinnery is confirmed by that of Carl Silver and H. A. Jones who with L. B. Silver, promoted, organized (1891) and incorporated (1895) The International O. I. C. Record Association of which L. B. Silver was President and H. A. Jones, Secretary. See Vol. A, Int. O. I. C. Record, page 7, et sequitur, Commission's Exhibits Nos. 501, 530, 229.

The idea of this new record association conceived by H. A. Jones, was enthusiastically received by L. B. Silver and carried out by them, Carl Silver and O. C. Vernon. Its plan is fully set out on page 7 of the Exhibits mentioned immediately above. And its *raison d'être* is clearly set out in the first two full paragraphs thereof as follows:

"We have no Record of the Chester White hog which can have a separate division on all State and Country fair lists. We are obliged to place the full Chester White hog in competition with any which may see fit to enter, regardless of a pedigree or any guide by which to judge the value and breeding of any animal, by the relative points on a score card, with all of same blended into a shapely and well proportioned hog.

"We have no Record which is National, except in name only. The present National

has been split up and divided; one branch being at West Chester, Pa., and one at Indianapolis, Ind."

The whole history of the formation of this new record association for Chester Whites and the causes for its disruption is given in the testimony of H. A. Jones, on pages 3101 et sequitur of the Record. This testimony of witness Jones confirms entirely what is stated on pages 7 et sequitur in the Commission's Exhibits mentioned immediately above.

Witness Jones produced a letter by Carl Silver, president of the petitioner, written March 4, 1895, to witness Jones which the witness says, page 3115 of the Record, contradicts the statement by Carl Silver that no Chester White blood was introduced into the so-called O. I. C. breed of swine at the date when Carl Silver took up the management of the petitioner. Page 3113 of the Record.

In this letter, admitted by Carl Silver to be his, page 31 of the Record, Silver mentions Orphan Boy, Grover Cleveland and Buckeye Girl. The animals were all of them pure bred Chester Whites. Orphan Boy was, as testified to by Whinnery, a Chester White and bred by him from pure bred Chester White ancestors. See page 3117 of the Record. Grover Cleveland was a Chester White out of Chester White ancestors, page 3117 of the Record. Buckeye Girl is also a Chester White.

On page 3119, witness Jones declares that Sec. note on page 27 of Commission's Exhibits Nos. 501, 530 and 229 was written by him. In this note appears the names of other famous full blooded Chester White pigs used by L. B. Silver and the L. B. Silver Company in their breeding operations to produce O. I. C.'s for customers. The animals named are Ohio Eclipse, Duke III, Old Centennial and Buckeye Boy. Ohio Eclipse is a Chester White out of Chester White ancestors, among which was Blue of Chester, No. 2096. The "portrait" of Ohio Eclipse is shown on the back of respondent's Exhibit No. 58. Duke III

is a Chester White out of Chester White ancestors as shown by Whinnery. See page 70, Commission's Exhibit No. 404. So were Old Centennial and Buckeye Boy.

On August 1, 1894, Carl Silver became manager of the petitioner. Page 3115 of the Record. His only contribution to the business was the elaborate system of bookkeeping stated in the early part of his testimony. He is not an expert on swine. Record page 3045. He employed and still employs one Galbreath as his herdsman and breeder. Practically his only change in the business was to cut off selling but not advertising second class Chester Whites and call all his hogs O. I. C.'s, save those he used as stool pigeons.

In harmony with the practice of his father, L. B. Silver, several noted Chester White hogs have been bought by Carl Silver as President of the L. B. Silver Company, the petitioner, for breeding O. I. C.'s. Their pedigrees, recorded as Chester Whites in the Chester White Records, were transferred to and recorded in the O. I. C. Record. Furthermore, dozens of the progeny of these hogs, produced by mating each of them to so-called O. I. C. hogs, were sold by the petitioner as O. I. C.'s to its customers and their pedigrees were recorded in the O. I. C. record. The names of some of these boars are NORVAL, BRIGHT EYES, OHIO CHIEFTAIN, SEBASTIAN, WILDWOOD'S MODEL and WONDER.

Now Carl Silver admitted that these certain named boars were not 100% pure O. I. C. and he did not know how much other blood they had. He also admits that he sold the progeny of these boars to customers of the L. B. Silver Company, the names and pedigrees of which are more specifically stated below.

For instance let us take up the case of the famous full blooded Chester White boar Norval. This boar is recorded as No. 30434 in volume 13 of the O. I. C. record. Its parentage is there shown to be a Chester White father and a Chester White mother. The

pedigree back to and including the sixth generation is shown by Com. Exhibit No. 102. Only one of the 62 ancestors of this boar up to and including this sixth generation was bred by the L. B. Silver Company and this ancestor can only have $3\frac{1}{8}\%$ influence on the characteristics of the hog Norval and it must be remembered, anyway, that all of the L. B. Silver Company's hogs trace back into Chester White records. Sixty-one of these ancestors were bred by Chester White breeders and were recorded in Chester White records. After the petitioner bought this boar Norval, it recorded him in the O. I. C. Record, and Carl Silver, president of the petitioner, testifies (on pages 2958-2964) that the petitioner sold 15 of the off-spring of this Chester White boar Norval as pure bred O. I. C.'s and he gives the names of the off-spring, the volumes in which they are recorded in the O. I. C. record, and the names and the addresses of the purchasers. See Commission's Exhibit, No. 101.

Another instance is that of the boar Ohio Chieftain. It is a pure bred Chester White, recorded as No. 32951 in Volume 21 of the Chester White Record. It was bought by the petitioner for breeding purposes, and then, as a pure bred O. I. C., was recorded by it as No. 54206 in volume 19 of the O. I. C. record. Professor Plumb traced the ancestry of this boar and gives it in Commission's Exhibit No. 423. He testified that all of its blood is Chester White blood and yet it was recorded by the petitioner as a pure bred O. I. C. under rule 3 of the O. I. C. Swine Breeders' Association Records rules. This case also indicates to Professor Plumb that the O. I. C. and the Chester White are one and the same breed. "I do not think you can look at it in any other way" he testifies on page 1568 of the Record.

Another famous full blood Chester White boar that was bought by the petitioner for breeding purposes is Wildwood's Model, R. p. 2950. At that time it was recorded as a Chester White, No. 32949 in volume 21 of the Chester White Record. After the purchase it was recorded as a full blood O. I. C.

as No. 54205 in volume 19 of the O. I. C. record. See pages 2954 and 3011-3018b. On these pages Carl Silver, the president of the petitioner testifies that he sold 24 of the off-spring of Ohio Chieftain and of Wildwood's Model as pure bred O. I. C.'s. Their names, their record number and the names and addresses of their purchasers are given in Com. Ex. No. 101, second sheet.

Another of these famous boars is Bright Eyes. This is a pure bred Chester White, recorded as No. 19779 in the Standard Chester White Record, purchased for breeding purposes by Carl Silver, acting for the petitioner, which he had the temerity to record as a pure bred O. I. C. as No. 30433, in volume 13 of the O. I. C. Record under the *changed name* of Champion Bright Eyes. See page 2449 of the Record. He also carried its picture as a pure bred O. I. C. boar in his advertisements under the changed name of C. H. Bright Eyes, which is an abbreviation of Champion Bright Eyes, the name he gave it after recording it as an O. I. C. in the O. I. C. Record. See page 2449 of the Record. The pedigree of this hog is shown by Com. Ex. No. 104.

The L. B. Silver Company, the petitioner, under Carl Silver's Presidency and management, used this boar for breeding purposes and thereafter sold as pure breed O. I. C. pigs 18 of his get. The names and the O. I. C. record numbers under which he recorded them as pure bred O. I. C. pigs together with the names and the addresses of their purchasers from the petitioner are given and admitted on pages 3018b et sequitur, by the petitioner's witness and president Carl Silver. Nothing more could be needed to show that the O. I. C.'s and the Chester Whites are one and the same breed and that the O. I. C. Swine Breeders' Association is an association recording Chester White hogs under its recording rules 1, 2 and 3. If this is not true and the O. I. C.'s and the Chester Whites are different breeds, as the petitioner and its equally guilty co-conspirator in wrong-doing, the O. I. C. Swine Breeders' Associa-

tion claims, then the L. B. Silver Company is selling cross breeds and not pure bred hogs at all and the O. I. C. Swine Breeders' Association is recording hogs of no breed whatsoever. This is a fraud upon the public.

Another instance is that of the boar Sebastian, No. 16209, Chester White, or No. 52086 of the O. I. C. Record, Commission's Exhibit No. 422. Professor Plumb traced the ancestry of this boar and found up to the 5th generation only six had any O. I. C. blood in them, and they were really all Chester White blood. Pages 1564-1566. Now Mr. Vernon afterwards attempted to show that some of the ancestry back of the 5th generation traced into the Silver herd, but he either could not or would not give, as did Professor Plumb, the names and the Record numbers of these animals. See Respondent's Exhibit No. 44, and see pages 2238 et sequitur. Now all of the animals of the so-called Silver herd trace back into the National Chester White Record, Witness McFadden, Page 1369 of the Record, and so are Chester Whites. Page 1567 of the Record. Hence the boar Sebastian, called by the O. I. C. people an O. I. C. is truly a Chester White. This shows that all O. I. C.'s are Chester Whites. On the other hand if the O. I. C.'s are a different breed, then Sebastian is a cross breed, because its ancestors were O. I. C.'s and Chester Whites, and hence not eligible to registry in the O. I. C. Record, and petitioner, by selling its progeny, was working a fraud upon its customers by selling as pure bred, animals from a cross-bred sire.

Now no fault can be found with the rules of the O. I. C. Swine Breeders' Association which permit of the above practices of recording these Chester White boars as pure bred O. I. C.'s if the O. I. C.'s and Chester Whites are one and the same breed, as they are. Professor Plumb, R. p. 1563. And nothing is wrong about the practice of the petitioner buying and using pure bred Chester White boars to mate to pure bred O. I. C.'s, if, as it is the fact, the O. I. C.'s and the Chester White are the same. The wrong

comes when the petitioner denies they are the same and uses them as if they were.

That the petitioner is still doing business after the fashion of its founder is shown by the testimony of Joseph E. Walton, who has lived in Salem, Ohio, over fifty years, and during all that time was engaged in farming, stock raising and buying and shipping. This man is acquainted with practically all the farmers in Columbiana and Mahoning counties, especially those farmers who breed hogs for the petitioner. Page 3206 of the Record. This witness has been for a long time and is now Public Sales Clerk for auctioneers of live stock. At these sales he has heard Chester White hogs represented at public sales by the owners and by the man in charge of the sales. These hogs were also called O. I. C.'s sometimes, more generally Chester Whites. Page 3209 of the Record. Buyers at these sales would purchase Chester White hogs and resell them to the petitioner. For instance, Clark Marlnee purchased a litter of eight white pigs, Page 3209 of the Record, saying to witness at the sale he "would deliver these pigs to Mr. Galbreath, and he thought they would make him a good profit as they were Chester White pigs that Galbreath would accept." Page 3210 of the Record. There were also other men selling to Galbreath, and witness testified Galbreath admitted buying pigs from Clark Marlnee and others. The witness has bought hogs from farmers breeding for the L. B. Silver Company, and they called them, generally, Chester Whites and sometimes O. I. C.'s or Ohio Improved Chesters. The names O. I. C. and Chester Whites are used interchangeably for the same animal. "They are common terms in public sales in my business." Page 3213 of the Record. Witness Walton has been judge of swine at a number of fairs.

He has "been at Galbreath's when pigs were delivered there. They were not above the average, at least, of the pigs we have in this country." He was not able to distinguish between Chester Whites and the pigs delivered to Galbreath except the latter are

rather of an inferior quality. Page 3217 of the Record. They showed the natural decline that all pigs would show by inbreeding, low behind the shoulders, down on their feet, not walking straight on their toes, and they lack the scoring points of quality, both in front, behind and in the middle. "Those were the pigs I generally buy of the farmers who sell to Mr. Galbreath or Mr. Silver's agent." Page 3218 of the Record. Mr. Meisner is a breeder for the L. B. Silver Company. He raises Chester White hogs and delivers them to Mr. Galbreath and Mr. Meisner called these hogs Chester Whites to witness Walton, when witness went to Meisner to buy some of them." Page 3220 of the Record.

As supporting the statement of witnesses McCann and Walton that hog people in and around Salem, Ohio, consider the Chester White and O. I. C. as one and the same breed of hogs, we have the testimony of Dr. McCandless, who is now and has been for many years a practising veterinarian in and around Salem, Ohio, that he "was always of the impression that the O. I. C. and the Chester White was one and the same hog." Page 1535 of the Record.

(b) *All the prominent authors on swine regard the O. I. C. hogs as nothing other than Chester Whites.*

All authors of any repute on breeds of swine, who have themselves made any investigations into the origin and history of the Chester White and have studied and compared the characteristics of the so-called O. I. C.'s with the Chester Whites, and who have not relied only upon the comparatively recent advertising matter of the L. B. Silver Co. or that of the O. I. C. Swine Breeders' Association, are firm in their opinion that the O. I. C. and the Chester White are the same breed. Examination into the claims of the respondent and further study and research only confirm this opinion.

Prof. George E. Day, sometime Professor of Animal Husbandry, Ontario Agricultural College, Guelph, Ontario, Canada, regarded as the leading swine authority with high standing in Canada and England,

(page 631 of the Record) author of "Productive Swine Husbandry," 1915, Commission's Exhibit from Congressional Library, calls the O. I. C. a strain of the Chester White. He says, page 67 of his book:

"The Ohio Improved Chester White, commonly known as the O. I. C. strain, is the product of the efforts of L. B. Silver of Ohio, who, in 1865, commenced breeding Chester Whites, and who aimed to produce a superior type through selection. This branch of the breed has an association and herd record of its own, but it would require a person more than ordinarily expert to distinguish animals of this strain from other Chester Whites, as they appear at the various exhibitions."

Prof. C. S. Plumb, regarded as the foremost swine authority in America, page 281 of the Record, author of "Judging Farm Animals," Commission's Exhibit from the Congressional Library, and "Types and Breeds of Farm Animals," Commission's Exhibit No. 405, page 740, regards the O. I. C. and the Chester Whites as the same breed. Prof. Plumb graduated at the Massachusetts Agricultural College with B. S. 1882, came to Ohio State University in 1902, organized the Department of Animal Husbandry and laid out the course of instruction and the work. That included the selection and appointment of instructors in the Department to conduct the educational work in Animal Husbandry. He was instructor at Purdue University and at Ohio State University for a period of thirty years, and was engaged all that time in the investigation into breeds and types of farm animals.

A publishing house in 1904 brought out his book, "Types and Breeds of Farm Animals," which was the result of five years of work, involving rather detailed discussion of the great breeds and some minor breeds. The last edition of this book was in 1920 and was offered in evidence as Commission's Exhibit No. 405. In order to prepare himself for the writing of that book, Prof. Plumb mastered a knowledge of the published literature on the breeds as found in monographs,

standard live stock journals, current agricultural journals, miscellaneous pamphlets of various persons and breeding associations, published relative to the breeds, and examined sale catalogues and had many interviews with breeders of the different breeds. See his index to Animal Husbandry Literature, Commission's Exhibit 426. He obtained his knowledge also from visiting herds, and from acting in the capacity of official judge for 30 years in the recognized shows of the country. This preparation was not confined to this country. It included four trips to Europe, on which he was entertained in the homes of many breeders. The last time he was abroad was for over a year. Page 1457 of the Record.

He has made an investigation of the history of the origin of the Chester White Hogs. The witness stated that in the course of his investigations into the history of the breeds of swine he made three or four trips to England and talked with swine authorities. A very personal friend of his for many years was Mr. Sanders Spencer, the author of the most favorably known book on swine that is published in England and which is used today as a leading authority. Mr. Spencer has been one of the greatest breeders in the history of England. Page 1485 of the Record.

Professor Plumb never heard in England of the breed called the Mammoth White. He has no recollection of ever seeing the use of this name at any time as a part of a breed name. It is used simply as a description of the size of hog. There is a breed in England called the Large White, a breed that we know of in this country as the large Yorkshire. (Pages 1485-1486.)

For many years the Royal Agriculture Society of England has been the official authority in that country for the records of so-called standard breeds. No breed is allowed to exhibit in the Royal Society Show, which is the great show of that country, without first having official recognition by the Royal Society. They have never recognized a breed with such a name as this. (Page 1487 of the Record.)

The medium for securing witness' information on the Chester White hogs came to him in the following ways: Beginning with 1892 he made the acquaintance of W. H. Todd, of Ohio, the originator of Todd's Ohio Improved Chester, who, until his death, was a personal friend of the witness. He employed Mr. Todd to come to Purdue University on several occasions and lecture to the students on Swine Husbandry. He had many conversations with Mr. Todd. The latter never claimed that he had a different breed from the Chester White and never stated to the witness that he had a different breed from the Chester White. He and Mr. Todd discussed the origin of the Chester Whites. At the same time he was Director of the Indiana Agricultural Experiment Station and purchased Chester White swine and bred two hogs at the Experimental Station. They were used in experimental and research work. Page 1463 of the Record.

In addition to that he has read works of the various authors to obtain such information as he could gather on the history of the Chester Whites. He has read the periodical literature about the Chester Whites. He has read the periodical literature on breeding, has gathered sale catalogues as issued by men that owned pure bred herds. Professor Plumb is absolutely convinced that O. I. C.'s are nothing more than Chester Whites. Pages 1457 to 1472 of the Record.

Perry Van Ewing, author of "Southern Pork Production," declares that the O. I. C. and the Chester Whites are the same breed of hogs. Mr. Van Ewing was for many years connected with agricultural colleges and experiment stations in official capacity. Jan. 1, 1912, he went to Kansas State Agricultural College as scientific assistant to the President. In 1914 he was main Animal Husbandman in charge of swine investigations in Georgia. On Oct. 1, 1917, he went to Texas Agricultural Experiment Station as Animal Husbandman in charge of swine investigations. Since Sept. 30, 1919, he has been engaged in

his own business of selling swine breeders' supplies. Page 937 of Record.

During his professional life, Mr. Van Ewing made investigations and research into the history of the various breeds of swine, including the Chester Whites and the O. I. C. hogs. The results of these investigations were published in the form of a book entitled "Southern Pork Production," in evidence as Commission's Exhibit No. 206. On page 51 he takes up the origin of breeds and strains of swine. He testified that in preparing to write his book he referred to all of the previously published books pertaining to swine that could be secured, and in addition wrote to the Secretaries of the different swine record associations and took up the matter with quite a number of breeders and with various men connected with the swine industry. Page 938 et seq. of Record.

On page 58 of his book, Commission's Exhibit No. 206, Mr. Van Ewing made the erroneous statement that the Ohio Improved Chester is a distinct breed resulting as an off-shoot from the Chester White. This statement is inconsistent with the genealogical tree on page 56 of his book, Commission's Exhibit No. 206, and ascribed to both the Chester White and the O. I. C.'s. Page 944 of the Record.

Criticisms and comments by others and investigation made by himself since the publication of his book, leads the witness now to believe that the statement made therein with reference to the O. I. C. as a distinct breed from the Chester White is incorrect. Page 948 of the Record. Witness does not now regard the Chester Whites and the O. I. C. as separate and distinct breeds. Page 949 of the Record. He stated that immediately after his book was issued his attention was called to the fact that there were some discrepancies in it in this, that he had in one place shown that the Chester White and the O. I. C. swine had exactly the same bloodlines. (See page 56 of the witness' book.) And in another portion (see page 58 of his book) he made statements to the effect that they were separate and distinct breeds.

Mr. Ewing on the stand testified that he made these statements that the O. I. C.'s and the Chester Whites were separate and distinct breeds by reason of some literature which he had received that had the L. B. Silver Co.'s name on it and that he did not go into the matter very carefully at that time, and took on faith a great many of the statements that were made in the Silver literature without attempting to verify them, and that he used some of those statements as a basis for the statement that he made on page 58 of his book. Page 950 of the Record.

Immediately after the book was published, objection was strenuously made to the statement therein that the O. I. C. and the Chester White were separate breeds and the objectors thought that the book should not be further distributed because of that error. This objection caused the witness to go into the matter a great deal more carefully than he had gone into it before. He states that his conclusion now is that the O. I. C. is not a separate breed. Witness said that the statements which he made in his book conveying the impression that the O. I. C. is a separate and distinct breed are in error (page 957 of the Record) and that if he were now going to write that part of his book over again, he would in order to avoid any controversy whatever, make no mention of the O. I. C. as a strain or breed in any way. This is the consensus of the opinion of the leading hog men and leading swine authorities. Page 954 of the Record.

Charles Dawson, author of "Success with Hogs," pages 36 to 38, regards the O. I. C. as Chester White.

W. S. Guilford, Director of Agriculture, Sacramento Valley Irrigation Co., California, in his book, "California Hog Book," recognizes the O. I. C. as a Chester White, and quotes an extended history of the origin of the Chester White on page 198.

Prof. William Dietrich, sometime Assistant Professor of Swine Husbandry, University of Illinois, Assistant Chief in Swine Husbandry, Illinois Agricultural Experiment Station, Urbana, Ill., and later Professor

of Animal Husbandry in the Northwest College of Agriculture, and author of a book called "Swine," writes on page 38 that the O. I. C. is a strain of the Chester White. See also his history in general of the Chester White hog breed and the O. I. C. strain, pages 83 to 88, inc., of his book, Commission's Exhibit from Congressional Library. Prof. Carl Warren Gay, head of Animal Husbandry of the University of Minnesota until July 1, 1920, and from then on Professor of Swine Husbandry in Ohio State University, and who is firmly of the opinion that the O. I. C. and the Chester White are the same breed, says that he first knew William Dietrich, author of "Swine," when Professor Dietrich was in charge of the swine work in the University of Illinois, at the time that Dietrich gathered most of the data for his book on "Swine." For three years Prof. Gay was quite intimately associated with Prof. Dietrich and knew his viewpoint and knew the care with which he wrote his book. He says that Dietrich had splendid opportunities to get his data when he was in charge of the Swine Husbandry work at the University of Illinois, that he was devoting his whole time to swine work, that he is a real scientific specialist and was pursuing research on quite a scale, especially with the breeding and feeding of hogs, and has every opportunity to gather data. Prof. Gay feels that he did gather it accurately.

Foster Dwight Coburn, author of "Swine in America," on page 36 of his book, Commission's Exhibit No. 429, refers to the O. I. C.'s as a "family of Chester Whites," and, under his chapter therein entitled "Chester Whites," he discusses the O. I. C.

Wilbur Jerome Carmichael attended country school, graduated from high school, graduated and received from the University of Illinois the degree of B. S. in 1915, and M. S. in 1916. From then until the latter part of 1917 he was Professor there in charge of swine husbandry, teaching and investigational work. In the fall of 1917 he was put in charge of the Government campaign for increased

pork production in the State of Illinois. In 1918 he was connected with the Federal Bureau of Animal Husbandry in charge of pork production over the entire United States. In 1919 he became Secretary of the National Swine Growers Association. While in the University of Illinois he had 300 head of hogs on the University farm at all times, sometimes 600. He has made a thorough study into the history and origin of the different breeds of swine. Has read all the text books, bulletins and circulars existing in order to teach at the University of Illinois the history of and how to judge the various breeds of swine. He taught for six years in the University of Illinois not only the fundamentals of the various breeds but going into the detail with the advanced classes in swine breed history, often having as many as 175 in a class. He taught and regards the so-called O. I. C. and Chester White swine as one and the same breed. The witness wrote an article to support the argument that the O. I. C. are one and the same breed with the Chester White. See Commission's Exhibit No. 16, set out in full on pages 311-314 of the Record.

Finally, Harry T. Morgan, a noted author on breeds of swine, wrote a lengthy article entitled, "What is the difference between the Chester White Hog and the Hog called the O. I. C.?", proving conclusively that the O. I. C. is a Chester White. This noted author of live stock, especially swine, is now engaged in livestock promotion work. He has for years made an extensive study of the history and origin of different breeds of swine. From 1910 to 1916, inclusive, Mr. Morgan was engaged in writing for various agricultural publications. Page 1288 of the Record. Practically his entire remuneration during that period was received from his writings on live stock subjects. He has written many articles on different breeds of swine, their histories and origin. In order to fit himself for this, he made

thorough investigations to secure foundations for writings on those subjects. Although he has a fairly complete library, he availed himself of access to others, including the Chicago Newberry Library and examined practically all the standard live stock works. Pages 1288 et seq. of the Record.

The witness offered as evidence of his qualifications as an author on swine, a series of articles that he wrote in 1916 for the Curtis Publishing Company, to-wit: that October 28, 1916, number of the Country Gentleman, Commission's Exhibit No. 225, contains his article on "The Berkshire"; the February 24, 1919, number of the Country Gentleman, Commission's Exhibit No. 226, describes "The Poland China"; the December 23, 1916, number of the same magazine, has one on "The Hampshire", while the April 21, 1917, number, Commission's Exhibit No. 226, has to do with "The Chester White." All these articles treat of the origin, history and characteristics of the breeds named. The foundations for all of these articles "were based to a certain extent upon the witness' own experience with pure bred hogs." Pages 1289 et seq. of the Record.

The data which are presented in these and other articles were secured from various breed histories, from live-stock works by writers of national and international reputation, and from the breed histories as found in the various volumes published by breed record association secretaries. It is still the opinion of this hog expert that the O. I. C. and the Chester White are one and the same breed. He says, "I have always treated the two as one breed in everything that I have written, and in everything I have ever said in any speech or meeting on the subject." Pages 1296 et seq. of the Record.

Mr. Morgan's article entitled "What is the difference between the Chester White Hog and the hog called O. I. C." appearing in the March, 1916, number of the "Swine World," and marked Commission's Exhibit No. 15, was based upon conclusions arrived at after a visit of considerable length in the offices of

the Secretary of the Chester White Swine Record Association, and from reading all of the printed matter sent out by the L. B. Silver Co. from year to year. Pages 1298 et seq. of the Record.

He stated that before he would consent to have anything on that topic appear over his signature, he would have to take some time to consider it, in order that he might consult with hog breeders, and carefully examine all the evidence he could find written in standard live stock works. He further stated that when he wrote that article he was not prejudiced in any way in favor of either the O. I. C.'s or the Chester Whites, and that he came to examine the question with an open and unprejudiced mind. He had no motive to misrepresent the facts and his opinion is now as when he wrote the article, that the O. I. C. and the Chester White are all one breed. Page 1299 of the Record.

Many of these authors, including Plumb, Ewing, and Morgan, testified that their works were not written with a view to any litigation nor to the interests of any litigable affair and were published primarily for their profession and in the interests of swine industry. Furthermore, they testified it was their understanding that every conclusion made in their writings would be subject to careful professional criticism, and the statements made therein would ultimately be open to certain refutation or denial if not well founded; that that thought was always in their minds in everything they have written; that they understood that their reputation depended upon the correctness of their data and the validity of their conclusions derived therefrom. These men further understood that they might better not have written their articles and books than to put forth statements in which might be detected a lack of sincerity of method and accuracy of results. They each also, save Ewing, and he corrected his one erroneous statement, testified that no criticism or comment or further investigation or

data gathered by them has been made since the publication of their articles that leads them to believe the statements made therein are inaccurate. Indeed, they all appear more strongly convinced than ever that the O. I. C.'s are nothing more than Chester Whites. The testimony of such disinterested expert witnesses of national and international fame is not to be cast aside in favor of the interested, non-expert testimony of prejudiced and uninformed witnesses for the respondent.

(c) *The so-called O. I. C.'s and the Chester Whites have each the same classification at all important State, National and International Fairs, Expositions, and Live Stock Shows, and by all other shows at which different breeds of swine are exhibited save and except only at those fairs which give a special classification to the so-called O. I. C. because they are induced to do so by financial offers from the O. I. C. Swine Breeders Association, an association promoting the so-called O. I. C. swine.*

Special classification of swine at fairs and exhibitions should be distinguished from separate classification. *SPECIAL* classification of swine at fairs is often given to different families or strains of the same breed. This often occurs when each family has its own record association and offers special premium money as an inducement, as in the case of the O. I. C. and Chester Whites. The Ohio State Fair Premium list is one of many examples. Pages 1658-9 of the Record. But special classification does not at all mean that the families of the one breed of swine are different breeds. Quite the contrary is the fact. See Prof. Gay, page 646 of the Record. *SEPARATE* classification may and generally does indicate difference in breed. This distinction must be carefully kept in mind, because two witnesses for the respondent,—see petitioner's witness Wade for example, pages 1974, 1975 and 1978 of the Record, and Lew Worster, Page 1764 of the Record,—have reasoned that because in some instances O. I. C.'s

have been granted special classification that was equivalent to separate classification, and meant the O. I. C.'s were a different breed from the Chester Whites. At the present time at none of the fairs and expositions where the Chester Whites are exhibited are the so-called O. I. C.'s given separate classification from the Chester Whites. At some they are given a special classification provided that the fair is granted a special consideration therefor. Pages 1658-9 of the Record. See the testimony of O. C. Vernon, a witness for the petitioner, and Secretary of the O. I. C. Swine Breeders' Association, on the elaborate propaganda of reply postal cards, and letters to O. I. C. breeders, and meetings with fair authorities, hereinafter referred to.

Although because of the propaganda work on the part of the O. I. C. Swine Breeders' Association some of the fairs have in the past granted separate classification, yet after hearing the other side of the matter, the fairs later have refused to recognize the O. I. C.'s as anything else than what they are, namely, Chester Whites. Witness Donaldson, for Nebraska State Fair, pp. 934-935 of the Record. Mr. Striplin for Southeastern Fair, pp. 164-169 and 821-825 of the Record. Mr. Walborn, Manager of the Ohio State Fair in 1920.

It is therefore seen that recognition by special classification, at fairs, expositions and other shows where swine are exhibited, is not obtained by reason of any merit that the so-called O. I. C.'s have as a distinct breed, but only because of money considerations offered to the shows by the O. I. C. Swine Breeders' Association to their own members only, and that in special classifications, the O. I. C.'s are regarded by all shows of any importance whatever as Chester Whites, which they are. Walborn, Donaldson, Striplin and other managers and secretaries of States Fairs.

Professor Plumb testified that he had a conversation with E. V. Walborn of the Ohio State Fair on the question of whether the O. I. C. and the Chester

Whites were one and the same breed. At that time the Ohio State Fair authorities were discussing the premium list for the 1920 show. Professor Plumb was asked to meet with the members of the Board and give an opinion as to whether he regarded the O. I. C. hogs as a separate breed from what we commonly call Chester Whites. And he gave it as his opinion that they were not a separate breed. The witness was informed at that meeting that the O. I. C. people were soliciting the Board for a classification as a separate breed (p. 1475 of the Record). He was afterwards informed that the Board decided not to offer a separate classification to the O. I. C. as a separate breed (p. 1477 of the Record). Orlando C. Vernon, as Secretary of the O. I. C. Swine Breeders' Association afterwards corresponded with witness Plumb to grant an interview to Carl Silver, to get the witness Plumb to change his opinion on this point, Commission's Exhibit No. 407, but witness replied with a refusal and gave his reasons therefor in full in a letter marked Commission's Exhibit No. 409, page 1483 of the Record.

Elmus V. Walborn, Manager of the Ohio State Fair, identifies Commission's Exhibit No. 448, as the 1920 Premium list of the Ohio State Fair and which he largely prepared. It is a part of his duties to classify the various breeds of swine in the premium lists. In 1919, Carl Silver, of the L. B. Silver Co., and Orlando C. Vernon, of the O. I. C. Swine Breeders' Association, requested witness and Fair authorities to recognize as a separate breed, the O. I. C. by giving it a separate class. They did not grant their request. This year, 1920, Carl Silver, as one of the directors of and President of petitioner, and Orlando C. Vernon, as Secretary of the O. I. C. Swine Breeders' Association, in a personal visit again requested the Fair authorities to recognize the so-called O. I. C. as a separate breed from the Chester White. The result of this meeting was that the Fair Committee did not grant their request. Page 1662 of the Record.

The above Mr. Walborn admits on page 77 in "Book 25," that a classification is given to Chester Whites and that on page 80, in "Book 26" a special classification is given to "O. I. C." But this classification is not given to the O. I. C.'s because they are regarded as a breed different from the Chester Whites, but on the contrary because the O. I. C. Swine Breeders' Association paid the premium money. And it is to be noted, as stated on page 81, that "All animals competing must be registered in the O. I. C. Swine Breeders' Association, O. C. Vernon, Secretary-Treasurer, Goshen, Indiana, by whom the above offering (of premiums) is made and will be paid when awards are officially certified to by the management of the Ohio State Fair."

Now Ohio is the very home of the so-called O. I. C. wherein it is claimed they originated in 1863, and in which they have been bred since that date. No other State ought to know the O. I. C.'s so well as Ohio and it is indeed significant that the authorities on swine in Ohio State, including Mr. Walborn, the Manager of the Ohio State Fair Association, and Charles S. Plumb and C. W. Gay, Professors of Animal Husbandry in Ohio State University, refuse to recognize the so-called O. I. C.'s as anything else than as Chester Whites.

Thomas H. Canfield, Chairman of The Committee on Rules and Classification of the International Association of Fairs and Expositions, testified that most of the fairs offer one classification for Chester Whites and allow the so-called O. I. C. swine if there are any to show under that class.

The Michigan State Fair, whose official name is The Michigan State Agricultural Society, is a member of the International Association of Fairs (see Commission's Exhibit No. 224) and the witness is personally acquainted with G. W. Dickinson, Secretary and Manager thereof. The authorities of that fair do not regard the so-called O. I. C.'s as a different breed from the Chester White. Witness testified that Dickinson stated to him that he wanted to get as

big a show of hogs as he could and he was not particular as to the difference between the breeds. "That he thought he would put in a classification for the O. I. C.'s, because he could obtain some money for them, and the fair would put in more money and in that way he would get more hogs on the fair grounds and make a better show. That is the way he explained it in general." (Page 1278 of the Record.)

Edward R. Donaldson, a breeder and raiser of pure bred hogs for years, page 933 of the Record, Secretary of the American Association of Fairs and Expositions, and Secretary of the State Board of Agriculture, Nebraska, witness, identifies Commission's Exhibits 106, 107 and 108 as true copies of the reports of the annual convention of the American Association of Fairs and Expositions. He identifies Exhibits 181 to 205, inclusive, to be exactly what they purport to be, to-wit: premium lists of various fairs. He testified, positively and without contradiction, that for the last three years he has been Secretary of the Nebraska State Fair; and that fair has been requested by Orlando C. Vernon, as Secretary of the O. I. C. Swine Breeders' Association for separate classification of the so-called O. I. C. hogs as a separate breed, and that although they granted Mr. Vernon's request for the year 1917, since then they, the O. I. C.'s have not been recognized as anything else than Chester Whites.

The American Association of Fairs and Expositions has refused to regard the O. I. C. hogs as anything else than belonging to the Chester White breed. The American Association of Fairs and Expositions met in annual convention at Chicago Illinois, on December 6 and 7, 1917. One of the purposes of the meeting was to discuss the classification of breeds of hogs. There was a discussion at that meeting as to whether the O. I. C. hogs should be classified as Chester Whites. The matter of whether the O. I. C. hogs should be classified as Chester White hogs or as a separate breed was brought to the attention of

the American Association of Fairs and Expositions at that meeting by the petition of Orlando C. Vernon, the Secretary of the O. I. C. Association. This matter giving the O. I. C. independent classification was referred to the classification Committee of the American Association of Fairs and Expositions. Mr. Vernon, in his petition, asked for a separate classification for the O. I. C.'s as a separate and distinct breed from the Chester Whites. That committee recommended "That the classification for all Chester White swine be designated simply as Chester White, and that the following record books be recognized as standard for the same breed—O. I. C. Swine Breeders' Association of Cleveland, Ohio and Chester White Record Association. (p. 838).

A witness for the Commission, Mr. Davidson, referred to page 136 of the Commission's Exhibit No. 107 as minutes of the annual convention of the American Association of Fairs and Expositions, and testified that at that meeting, after hearing the O. I. C. people, the classification committee reported as follows:

"Mr. Chairman and Gentlemen: The committee on classification has not much to report this year, as usual, but submit the following report, that the class previously known as Chester White swine be designated as Chester White, and O. I. C. All animals eligible to be shown in the above class must be recorded, or be eligible to record in one of the following Record Associations, to-wit: National Chester White Record Association of Westchester, Pennsylvania; the Chester White Record Association of Rochester, Indiana; the O. I. C. Swine Breeders' Association of Goshen, Indiana. The O. I. C. Swine Breeders came to us last year, and as we understood it asked for separate money classification, and we turned it down, but we find that the mistake was on our part. They simply asked to be recognized as Chester

Whites, which they are. We thought it was nothing unreasonable in their request to allow them to show what they asked so we allowed it." Page 840 of the Record, see also Carl Silver's letter, page 2754 of the Record.

And this means to the witness that the Chester Whites and the O. I. C.'s were regarded at that convention and by the fair men as the same breed, namely Chester Whites. R. p. 841

The witness Davidson next referred to Commission's Exhibit No. 108, a report of the classification Committee during the meeting of the American Association of Fairs and Expositions, Chicago, December, 1919, as follows: (page 843)

Mr. Fuller: Your committee on classification has but one recommendation to make, and that is in reference to the title of the classification for Chester White and O. I. C. swine. The classification committee of 1918 recommended that hereafter this classification be headed, 'Chester White and O. I. C. swine.' We find on investigation that a very small per cent of the members of the Association observe this recommendation, the majority using the heading 'Chester White,' along. It appears that the majority of our members follow the shorter heading, and we therefore recommend that the heading 'Chester White' be adopted as the official heading recommended by the Association."

In Commission's Exhibit No. 106 is found a full discussion on the above mentioned report. See pages 844 to 851 of the record. In these discussions Mr. Silver's name is mentioned, and it is stated by various persons taking part, especially Mr. Russwurm, page 844, Mr. Davidson, page 846, and Mr. Russell, 849, that the O. I. C. and the Chester Whites are one and the same breed of hogs.

Witness Davidson also stated that as Secretary of the Illinois State Fair he had received 130 postal

cards from Vernon, Secretary of the O. I. C. Swine Breeders' Association, which cards were replies to cards sent out by Vernon to O. I. C. breeders asking them to petition the Illinois State Fair Association for recognition by it of the so-called O. I. C.'s as a separate breed from the Chester White. Mr. Vernon personally told witness he had canvassed the breeders throughout the State of Illinois who then signed the 130 postal cards. In order to find out the good faith of these men who wrote the postal cards, witness wrote each and every one and received only 28 replies. These replies, especially two of them, Commission's Exhibits 116 and 117, convinced witness and the Advisory Board of the Illinois State Fair Association that the O. I. C.'s and the Chester Whites are one and the same breed and they should be all classified as Chester Whites. Page 875 of the Record.

Witness Davidson recognizes Commission's Exhibits Nos. 120 to 180 of the American Association of Fairs and Expositions. There are sixty fairs that belong to the Association, and witness personally knows the secretaries of every one of them. And all of the fairs with the exception of Michigan, Tennessee, and Atlanta, Georgia, and perhaps two smaller fairs are giving the one classification this year. So "Mr. Vernon was telling me." Page 889 of the Record.

Witness further said that he told Mr. Vernon that he regarded the O. I. C. and the Chester White as Chester Whites with two associations, page 904 of the Record, and that he also regards the O. I. C. Swine Breeders' Association as an association recording Chester White swine. Page 905 of the Record. A superintendent of fairs would not have the right to disregard the rule of the American Association of Fairs and Expositions that the Chester Whites and the O. I. C.'s should be classified as one breed and classify them as separate breeds.

A persistent and extensive propaganda has been for years carried on by the O. I. C. Swine Breeders'

Association and Carl Silver, President of the petitioner, with a view of getting the various fairs to recognize the O. I. C.'s as a separate breed. Page 2190 of the Record. Among others, two-clear-cut methods are used to induce the fair authorities to take such action. One of these two methods is to send out from the O. I. C. Swine Breeders' Association printed reply postcards to O. I. C. breeders asking them to fill out the blanks in the reply-card and send them to the Secretary that he may use them as a lever to persuade the fair authorities. Page 2183 of the Record.

But the O. I. C.'s (and those only of them whose pedigrees are recorded in the O. I. C. record) are granted special classification only, as, in Ohio. See testimony of Professor Plumb and Ohio State Fair manager Walborn, Michigan. See testimony of Davidson, President of American Association of Fairs and Expositions, and other fairs for the financial aid the shows may secure from that, the O. I. C. Swine Breeders' Association.

It was attempted by witnesses Wade, Frost and Vernon, for the defense, to show that the O. I. C.'s were given a classification at many fairs as a separate breed because those fair authorities gave the O. I. C.'s a special classification. This position of the defense should be noted. It has no basis in fact. The conclusion does not follow from the premise. For instance witness Wade testified that of his "own knowledge" he knew the Michigan State Fair authorities considered the O. I. C.'s a distinct breed, different from the Chester Whites and for that reason gave them a separate classification. Page 1974 of the Record. But he finally admitted on cross-examination that what he "knew of his own knowledge" was only after all his conclusion drawn from the fact of special classification. (See pp. 1975 and 1978 of the Record.)

But we have the positive testimony of the Government's witness Davidson, President of the American Association of Fairs and Expositions of which Association the Michigan State Fair is a member, that

that fair does not regard the O. I. C.'s as a different breed from the Chester White and cites as his authority Mr. Dickinson, the manager of the Michigan State Fair, who said that he gave the O. I. C.'s special classifications for financial reasons. The same is true with regard to separate classification at the Southeastern Fair. Witness Wade says the authorities of that fair consider the O. I. C.'s a distinct breed, because they gave the O. I. C.'s a separate classification. But he admits that he has no other knowledge than his own opinion. Page 1977 of the Record. Directly contrary to this we have the positive and uncontradicted testimony of Commission's witnesses Russell and Stone. These witnesses state that Mr. Striplin, the manager of The Southeastern Fair, did at first, at the request of the O. I. C. people and without due consideration, grant the O. I. C.'s classification on the ground that they were a separate breed. But after an examination into the facts, Mr. Striplin has changed his mind and will no longer, as the Fair's manager, recognize the O. I. C.'s as any other breed than as Chester Whites. See on pages 164-169 and pages 821-825 of the Record, testimony of witnesses Russell and Stone on this point.

The lack of interest of the O. I. C. breeders, themselves, in the first method is shown by the testimony of Vernon, Secretary of the O. I. C. Swine Breeders' Association, that out of 2,000 reply postcards sent to O. I. C. breeders throughout New York, Illinois, Nebraska, Iowa, Michigan, Ohio and Minnesota, pages 2113 and 2114 of the Record, only 754 reply cards were returned, and not one of those State Fairs recognized the O. I. C. as a separate breed.

Another of the two methods referred to is to send out letters to the various State Fair authorities, page 2210 of the Record, offering the whole or part premium moneys offered by the Fair to O. I. C.'s exhibitors provided the fair authorities will give the O. I. C.'s a classification. A great many of the fairs are willing to give a special classification for the

O. I. C. hogs on that condition, but do not agree to recognize that such classification is intended by the fair authorities to acknowledge that the O. I. C.'s are a separate breed. For instance, witness Vernon was asked the following question:

"Do you understand anything of the considerations which guide the Fair association managers in making these classifications of swine," and answers, "Well, I think they would like to have all the funds that they can get from record associations to help them. * * * And when the swine are given different classifications that means more funds." Witness thought that if the record association offers to pay half the prices which are offered by the fair for the breed that the record association represents, that would be an inducement to the fair authorities to give that breed recognition or classification. Witness says that it is true that he has made requirements on State Fair authorities that unless the O. I. C.'s were given a special classification, he would refuse to contribute towards the premium lists. Page 2204 of the Record.

This testimony out of the mouth of the petitioner's own witness shows that some fairs, especially those smaller fairs struggling with financial problems, will give a special classification to the O. I. C.'s if the O. I. C. people will contribute the whole or part of the premium money offered for them. The testimony also shows that the O. I. C. people require as a condition precedent to giving money toward the fair funds, that the fair authorities give a special classification to those O. I. C.'s only, recorded in the O. I. C. record, and convinces one that the O. I. C.'s are recognized only because of the financial support offered by O. I. C. Swine Breeders' Association and are not given a classification because the State Fair authorities really and actually believe that the O. I. C.'s are a separate breed from the Chester Whites.

Professor Gay was asked this question, page 645 of the Record, "At these fairs, state whether or not the O. I. C. hog was classified as a breed separate and

distinct from the Chester White, or classified with the Chester White as a Chester White Hog." He answered, page 646 of the Record,

"It is a matter of memory. That is, I have not seen the classification in every case; at least, I cannot swear that I have seen it, but it is customary to classify these hogs as Chester Whites, and in an open classification they will be shown as Chester Whites. Then in some instances the O. I. C. Association may give what they call O. I. C. specials. For instance, if the winner in the open class happens to be an O. I. C. they will give him an additional prize in recognition of the fact that he was bred along the O. I. C. lines. But he wins first as a Chester White hog, and then the O. I. C. Association comes along and says, 'in consideration of the fact that he is bred along the O. I. C. lines we will give you a special prize or bonus,' but to my knowledge at most of the larger fairs—in fact, I cannot recall a fair that does not classify the O. I. C.'s with the Chester Whites, and as Chester Whites, in the open classification, and not as a distinct and separate breed, and the only place that they have any distinctive O. I. C. classification is in the specials."

Vernon, the Secretary of the O. I. C. Swine Breeders Association, admits practically the same. Page 2194 of the Record.

The petitioner's witness, Lew Worster, admitted that at the St. Louis Fair, sometimes called the World's Fair at St. Louis, 1904 (see page 1847 of the Record), all the O. I. C. hogs were shown as Chester Whites. See page 1841 of the Record, and the premium list of that Fair, Com. Ex. No. 425. And petitioner's witness Frost in his letter, see Respondent's Exhibit No. 26, confirms this. He was a prize winner at that fair.

And finally and in conclusion on this point, Carl Silver himself, President of and chief witness for the

petitioner, admitted in his testimony, page 2926 of the Record, that the fairs and expositions throughout the United States are not recognizing the O. I. C.'s as anything else than Chester Whites. The National and International Swine shows "do not recognize us." Carl Silver, p. 3032 of the Record.

(d) *The rules and regulations of the O. I. C. Swine Breeders' Association pertaining to the recording of swine pedigrees in the record, or herd books or the year books, as they are variously called, of that association show, and different eminent professors on swine husbandry use them in their swine classes as showing that the so-called O. I. C. and Chester White swine are one and the same breed. See, for example, professors William Henry Tomhave, John Benjamin Rice, Wilbur Jerome Carmichael, Charles Sumner Plumb, Carl Warren Gay and John Marcus Evvard.*

All modern well recognized breeds of hogs have one or more associations whose principal function is to record the pedigrees of hogs belonging to the breed represented by its association. In order that breed purity and breed identity may be maintained these associations prescribe rules and regulations by following which only these pedigrees may be recorded. By this means the record associations of each breed keep out of their records the pedigrees of cross breeds and grades. The rules and regulations under which the pedigrees of hogs are eligible for recording pedigrees in The O. I. C. Swine Breeders' Association are found in the record books of that association, for instance see Volume 10, Commission's Exhibit No. 214, and are interpreted by the above named experts. It is the conclusion of all of them that under these rules they must recognize that the O. I. C. and the Chester White are the same hog.

Rule I declares that the pedigree of "The direct offspring of an O. I. C. sire and dam recorded in the Record of the O. I. C. Swine Breeders' Association or in some existing reputable record of Chester White Swine," is eligible to record in that association.

Prof. Evvard says of this rule: "Now, as I see that, if the O. I. C.'s are eligible for record in the Chester White record that indicates that they are the same thing, the same breed, Chester White." Page 1066 of the Record. See also Prof. Rice, page 992 of the Record. Professor Plumb stated, page 1561 of the Record, that this rule would imply to him as an expert "that the Chester White registered in the Chester White Association record is a reputable Chester White, and is therefore eligible to registration in the O. I. C. record." "That if they were different breeds, 'it could not be possible.'" The Chester White Record Association is a reputable association, so far as he knows, recording Chester White swine; Prof. Gay states that "the rules for recording are practically what would be the constitution of an organization." "There is nothing in their rules to show them (the Chester White and the O. I. C.) to be distinct." Page 636 of the Record. After reading rule I he declares: "Now, there is the first reference to common identity, 'the offspring of O. I. C. sire and dam, or of any reputable Chester White swine.'" Page 638 of the Record. Prof. Carmichael says (Page 1182, 1183, of the Record) that "In my opinion, under the conditions of Rules 1 and 2 nothing but Chester White Swine could be recorded."

The second rule for recording the pedigrees of hogs in the O. I. C. Swine Breeders' Association says: "The Secretary may, at his discretion, record animals the sire or dam of which is an O. I. C., recorded as above, the other direct ancestor of which is in some reputable C. W. Record or in the International Record previous to the appointment of the receiver." This rule also is interpreted for the Commission by the several Professors. Prof. Evvard says that rule 2 indicates that the O. I. C.'s are Chester Whites. Page 1066 of the Record. "My conclusion is based upon this reasoning: First, if the O. I. C.'s, so-called, and the Chester Whites, are two separate and distinct breeds, then if they were crossed together the result

would not be a pure bred but a cross bred, which is almost the antithesis of a pure bred, because it is a mixture of pure breeds. As this book says that this cross is eligible for registry, it would indicate that it is a pure bred," and indicate that it was eligible for registry for record" in the O. I. C. record. Now we cannot cross two pure breeds without getting a cross bred. That is a fact. Second, if the O. I. C.'s and the Chester Whites are distinctly the same or identical breeds, then when they are crossed together they will give, of course, a pure bred, which pure bred, of course, is eligible for registry. Therefore I infer from this that the O. I. C.'s and the Chester Whites are identical breeds." The progeny resulting from a mating between an O. I. C. and a Chester White is a "pure bred Chester White because I only recognize one breed," and the progeny is eligible for registry in the National Chester White Record Association, The Chester White Record Association and the O. I. C. Swine Breeders' Association. It is the witness conclusion that it is generally recognized that the latter Association in their records record Chester Whites and "a search of their records will show that." Page 1069 of the Record. The witness further said that as Professor at Ames, Iowa, he teaches the history, origin and differences of breeds of swine, and that he refers "to these O. I. C. records naturally as first hand information, and they are part of the literature on the subject," and that he uses these records in teaching his students to establish the fact that the Chester White and the O. I. C. are one and the same breed. See pages 1071 and 1072.

On this point Prof. Gay testified that he uses the various swine records in his teaching including the Chester White. He has all the volumes of the O. I. C. record except the first, and uses it in his teaching as an old record of the Chester White hogs. Pages 635, 636 of the Record. The rules for recording the pedigrees of hogs in the O. I. C. Record leaves Prof. Gay with others to believe that the O. I. C. and the Chester White hogs are the same breed. After reading rules

1 and 2 of the O. I. C. record Prof. Gay declared "that is the basis for our accepting these two as one breed." The statements of rule 2 leads Prof. Gay to classify the so-called O. I. C. hogs as Chester White hogs "because it provides for the record of animals whose sire or dam is recorded as an O. I. C., the other ancestor having what might be considered old line Chester White Record, which recognizes a breed identity and does not recognize any breed distinction." Page 639 of the Record. If the O. I. C. and the Chester White were two distinct breeds such a mating as indicated by rule 2 would result in a cross bred and not a pure bred, and therefore could not be recorded in either the O. I. C. or Chester White record. Page 640 of the Record.

Prof. Gay teaches students to judge swine and in judging to differentiate between the different breeds of swine. "That is one of the things we lay great stress on." Page 641 of the Record. He does not teach that there is any difference in breed between the O. I. C. and the Chester White. "We cannot. We don't recognize any difference." He teaches that they are one and the same breed for "The reasons already given as to the origin and breed history, and the fact that you cannot identify one from the other, which would preclude any possibility of teaching distinctive characteristics."

In further confirmation of Prof. Gay's position he refers to the first sentence of the tenth full paragraph of the "Proceedings of the Tenth Annual Meeting" of the O. I. C. Swine Breeders' Association, Commission's Exhibit No. 15. This sentence declares: "The O. I. C. record is now the only Chester White Record having Government certification." Regarding this the witness commented: "This is the proceedings of the annual meeting of the O. I. C. Record Association, and in the records of that meeting we find the statement which seems to me commits them to the fact that the O. I. C. and the Chester White are identical, because they state that the O. I. C. Record is the only Chester White Record having government certifica-

tion. They place themselves on record as a Chester White association," recording Chester White hogs and "absolutely," signifies that the O. I. C. is a Chester White hog. Page 643 of the Record.

Professor Tomhave declares in reference to rule 2 that if the Chester White was one breed of hog, and the O. I. C. was another breed of hog, live stock men would regard the offspring from the mating of the so-called O. I. C. and the Chester Whites as a cross breed and that offspring would not be entitled to registry in either the O. I. C. or the Chester White Record. Page 300, 301 of the Record. He also teaches the O. I. C. are Chester Whites. R. p. 292-294.

Professor Plumb's interpretation of rule 2 is that under it one may use an O. I. C. male for a sire and a Chester White female for a dam or reverse it and have an O. I. C. dam and a Chester White sire. Now if the O. I. C. were different breeds the progeny of such matings would be half bred or cross bred and would not by common practice be eligible for record in either record, and if they did record such progeny in either record that would be a false entry. See pages 1561 and 2. No fault could be found, however, if the O. I. C. and the Chester White were one and the same breed, "because in that case they would have to be recorded as representing family lines within the breed" and there would be nothing wrong in making such a record. Page 1563 of the Record. He too teaches the O. I. C. and Chester White are the same. R. p. 1561.

Professor Carmichael, who has made an exhaustive study of herd record associations, who has gone into the history of every swine record association in the United States and foreign countries that he has ever heard of, who has tabulated that material and published a number of articles on that subject, page 1174 of the Record, after examining rule "declares that under that rule if the O. I. C. and the Chester White were separate and distinct breeds the progeny, resulting from the mating of animals the sire of dam of

which is an O. I. C. recorded as in rule 1, the other direct ancestor of which is recorded in some other reputable C. W. record, would be a cross-bred hog, and on the other hand if the offspring of an O. I. C. sire mated to a Chester White dam is permitted under rule 2, as it is permitted, to be recorded in the O. I. C. record it would indicate without any doubt to the witness as an expert on swine records that the O. I. C. and the Chester White were one and the same breed. See his article Commission's Exhibit No. 16. Page 311-314 of the Record. Professor Rice of the University of Illinois, is of the same opinion. Pages 992 and 993 of the Record. Carmichael and Rice both taught students that O. I. C. and Chester White are the same. Record pages 1182-3, 992.

William Merritt McFadden, Secretary of the American Poland China Association who is familiar with the rules and regulations that govern the admission of pedigrees into the records, of the various breeds of swine examined Commission's Exhibit 14, and read rule 3 under the rules for recording pedigrees of O. I. C. swine. He then testified, as an expert on Swine Record Associations, that under that rule the O. I. C. people certainly could record in the O. I. C. record a hog whose sire and dam is a hundred per cent pure bred Chester White. Page 1376 of the Record. Instances are numerous where the O. I. C.'s and Chester Whites are registered in either of the three record associations, the National Chester White Record Association, the O. I. C. Swine Breeders' Association and the Chester White Swine Record Association. For example, E. C. Stone, President of the American Association of Swine Records, testified, page 734 of the Record, "My father * * * for many years raised pure bred Chester Whites or O. I. C.'s * * * My father registered pigs *from the same* litter in both records, in the O. I. C. record and in the Chester White Record. So far as I know those registrations still exist. They have never been disqualified, or thrown out of the O. I. C. record or the Chester

White Record." Page 735 of the Record. See also page 1856 of the Record where Sidney D. Frost, a witness for the petitioner, says hogs from the same litter have been recorded in both the O. I. C. and Chester White Records.

John Benjamin Rice, Teacher and Investigator of swine husbandry, University of Illinois, says that he bought for the University of Illinois, hogs that were shown under him as Judge at fairs that were recorded in the O. I. C. Record Association to put them with the University Chester White herd, that he received the pedigree papers for these O. I. C. hogs, that he mated these hogs with the Chester White hogs which were a part of the University herd, and that he put them in in par with the hogs which are recorded in the Chester White Record Association, and the offspring of those matings are recorded in the Chester White Record Association and no difference is made between the two. It is his opinion that under the rules of the O. I. C. Swine Breeders' Association the pedigrees of that offspring would also be eligible for registry in The O. I. C. Swine Breeders' Association. Page 990-992 of the Record.

Now it is an undisputed fact that pure bred swine at the present time are generally considered to be those hogs whose ancestors are recorded in a reputable swine record association or in a recognized swine record association. The result of crossing a pure bred animal of one breed with a pure bred animal of another breed is a cross bred. No record association permits the recording of cross bred. If there is any admixture of outside blood into a pure bred the descendants of such crossing would not be eligible to registry, and after the breed is established no animal traced back to that cross bred would be eligible to record in any reputable record association. See witness Carmichael, Page 1079 of the Record, probably the best informed man in America on Swine records and Swine Record Associations.

Professor Tomhave, a witness for the Commission, referring to the above statement in volume 10 of

the O. I. C. record, namely; "The O. I. C. is now the only Chester White Record having government certification," says this means to him that the O. I. C. Swine Breeders' Association is a Chester White record recording Chester White hogs as a breed. He does not see how you can interpret that in any other way. Page 296 of the Record.

The naive position taken by some of the respondent's witnesses on the matter of recording pedigrees of hogs under rules 2 and 3 of the O. I. C. Swine Breeders' Association is illustrated by the testimony of Wade. He said: Rules 2 and 3 are not used. They are practically dropped because "we do not expect to record anything but what is O. I. C. in our Record." That admits they have all along recorded Chester Whites. Having seen that this is not consistent with their claim that the O. I. C. is a distinct breed, they are now saying for the first time that rules 2 and 3 are obsolete.

They have not, however, stricken these rules 2 and 3 out of their year books. They still appear in the last 1917 printed volume of their record. And Vernon, witness for the petitioner, and Secretary of the O. I. C. Association, testified that in 1918 it was possible to record pedigrees of Chester Whites under rules 2 and 3 of volume 20 of the O. I. C. Record. See page 2173 of the Record.

(e) The National Association of Swine Records refused to admit into its membership the O. I. C. Swine Breeders' Association as an association recording a breed of swine separate and distinct from the Chester White but did offer it entrance as an association recording Chester White swine.

The National Association of Swine Records is an association whose members consist of the various associations recording pedigrees of different breeds of swine. The several record associations, which are members are represented generally at meetings of the National Association of Swine Records by their Secretaries and Assistant Secretaries. The purpose of the existence of the National Association of Swine

Records is to bring closer relations among all of the swine records for uniform classifications at fairs, to assist the National Swine Growers Association of America and to get uniform shipping and inspecting laws in the different states, and to eradicate such troubles as might arise in individual associations (see p. 743 of the Record).

Some time during the spring of 1920 the O. I. C. Swine Breeders' Association, by Orlando C. Vernon and Carl Silver, as an association recording pedigrees of hogs of a breed separate and distinct from the Chester White, applied for admission into membership of the National Association of Swine Records (pp. 1368, 1369 and 1370) of the record. In order to consider that petition and to afford the O. I. C. people the opportunity of a full hearing thereon, a committee of the National Association was appointed and met in Chicago with Orlando C. Vernon, as Secretary of the O. I. C. Swine Breeders' Association, and Carl Silver, as President and Manager of the L. B. Silver Company and as Trustee of the O. I. C. Swine Breeders' Association. Page 1369 of the Record.

At that hearing full opportunity was given Mr. Carl Silver, as president of the petitioner and Mr. Vernon, as secretary of the O. I. C. Swine Breeders' Association to support their claim that the so-called O. I. C. swine should be recognized as a breed separate and distinct from the Chester White. Witness W. M. McFadden, Secretary of the American Poland China Record Association, which Association is a member of the National Association of Swine Records, and who was appointed one of the members of this committee, says, on this point, page 1381 of the Record, "I cross examined him (meaning Carl Silver), I expect you might say. At least, I asked him a number of questions for my own personal information. We had never heard Mr. Silver's side of this matter before, and I was very anxious to get information on it because I wanted to act on the committee as I thought was proper."

After carefully considering all the facts, and after due deliberation thereon, the Committee made a report recommending that the O. I. C. Swine Breeders' Association be admitted into membership of the National Association of Swine Records as an association recording Chester White Swine, Page 1371 of the Record. A true copy of the minutes of this meeting of this committee and their official report is identified by Arthur R. Simpson, as Secretary of the National Association of Swine Records as a report written himself. A true copy of these minutes, carefully checked by the witness Simpson was introduced into the record of this case and is marked Commission's Exhibit No. 232. See also Commission's Exhibit No. 231, page 1327 of the Record. These minutes conclusively show that the National Association of Swine Records refused to recognize the O. I. C. Swine Breeders' Association as an association recording anything else than Chester White Swine.

Edgar Clayton Stone, President of the National Association of Swine Records, Secretary of The American Hampshire Swine Record Association, and owner and publisher of the Hampshire Advocate and another paper called The Farmer, stated that for many years he bred and raised O. I. C.'s or Chester Whites. He testified at the Chicago hearing, Pages 787-792 of the Record, that The O. I. C. Swine Breeders' Association is not a member of the American Association of Swine Records; that "they made application for membership, and the Committee on eligibility to membership gave Mr. Silver, who is present here, a hearing, and Mr. Vernon, Secretary of the O. I. C. Record Association took up a good portion of an afternoon, and the Committee reported after due consideration that they should be accepted as the O. I. C. Record Association recording Chester White Swine, because their foundation hogs were originally recorded in the Chester White herd book. They asked recognition as a separate and distinct breed, and presented a showing to show that they were a distinct breed, but it did not meet with the

approval of the Committee, or of the entire membership of the National Association of Swine Records for that matter." The witness further stated that the Committee "had to consider whether" the O. I. C.'s were a distinct breed, or the same as the Chester White. That was the real thing in issue; that while F. F. Moore "was a member of that Committee he was not even permitted to stay in the room for the hearing, on account of possible biased opinion." F. F. Moore did not take part in the hearing of the arguments pro and con on that question and did not take part in making up the judgment which the Committee arrived at.

(f) *The pedigree of every O. I. C. hog traces back into the Chester White records and into no other records.*

The pedigree of every O. I. C. hog traces back eventually into the Chester White Records and into no other records. Vernon, Secretary of the O. I. C. Swine Breeders' Association, and keeper of its swine pedigree record, pp. 2175, 2176. See also p. 3126 of the Record. This is alone conclusive proof that the O. I. C. hogs are entirely Chester Whites.

The latest record for recording the pedigrees of O. I. C. hogs is the present day pedigree record kept by the O. I. C. Swine Breeders' Association and whose secretary is O. C. Vernon, one of the petitioner's witnesses. This Association was organized November 10, 1897, and recorded the first O. I. C. pedigree December 16, 1897. See Com. Ex. No. 39, Volume I, O. I. C. Swine Breeders' Association Record. At the same time it must be remembered that many of these same O. I. C. hogs were registered by their owners or their breeders, as full and pure blooded Chester White hogs, in contemporaneous Chester White records. Testimony of Whinnery, Frost, Stone and Plumb on this point, and see also p. 1377 of the Record.

Before the organization of the above named present day O. I. C. Record the pedigrees of all O. I. C. hogs were registered in the O. I. C. record immediately preceding this present day O. I. C. record. This was

the International O. I. C. record whose association was organized in 1890 and whose first secretary was H. A. Jones, a witness for the Commission. At the same time it must be remembered that many of these hogs were also registered in contemporaneous Chester White Records as full and pure blooded O. I. C. hogs. See testimony of Whinnery, Stone, Plumb, Frost, on this point.

"I do not think I ever bred or sold hogs for breeding purposes that were not eligible for record in both the O. I. C. Swine Breeders' Association Record, and the Chester White Swine Record Association Record. I have, from time to time, added hogs to my herd that were recorded in some association other than the O. I. C. Swine Breeders' Association records. I have about three or four, all but one of those was eligible, though from the old back tracings. One time I bought, as I think I mentioned in my direct testimony, a pure bred O. I. C. that was recorded in a Chester White Record in 1913, both her sire and her dam were Chester White recorded. I changed her registration back to the O. I. C. records." Sidney Frost, one of the witnesses for the petitioner, and trustee of the O. I. C. Swine Breeders' Association and the most prominent O. I. C. swine breeder, at p. 1839 of the record. And see page 1856 of the Record where this same Frost testified that hogs from the same litter have been recorded in both the O. I. C. and the Chester White Records.

Witness Carmichael, the Secretary of the National Swine Records Association went over every pedigree in Volume I, O. I. C. record and all traced back in the Chester White records. P. 1220 of the Record. See also Herbert A. Jones' testimony p. 3126 of the Record.

These things prove that all the pedigrees of all the hogs registered in the International O. I. C. Record and in the O. I. C. Swine Breeders' Association Record trace back into the National Chester White Record or some other Chester White Record.

Page 2175 of the Record. This fact alone establishes beyond controversy to all unprejudiced persons that the so-called O. I. C.'s are Chester Whites. There is no parallel case in all swine record history where all the pedigrees of one breed of hogs trace back into the record books of another breed association. All the authorities are agreed upon that. The fact that the pedigrees of all the hogs recorded in the International O. I. C. Record and in the O. I. C. Swine Breeders' Association Record trace right back, all of them, into the National Chester White Record or other Chester White Records is of itself conclusive evidence that the O. I. C.'s are nothing more than Chester Whites.

(g) *The National Swine Growers Association, though petitioned by the petitioner's president and the secretary of the O. I. C. Swine Breeders' Association, have, after a full hearing of both men, and after due deliberation, refused to recognize the O. I. C. swine as anything else than Chester Whites.*

The Government's swine expert, E. Z. Russell, testified, page 35 of the Record, that of his own personal knowledge the O. I. C. interests asked the National Swine Growers Association, of which he is a member and a former secretary, at a meeting of that association when he was present and took an active part, for recognition as a separate breed and that the Association refused on the ground that the O. I. C.'s and the Chester Whites were one and the same breed. Pages 34, et seq. of the Record. Note that this association is a different association from the National Association of Swine Records.

It was decided, said the witness at that meeting, that the O. I. C.'s and the Chester Whites were one and the same breed and that since the Chester White breed had a representative as a member of the Executive Committee that took care of the O. I. C.'s, page 36 of the Record, no other representative for the O. I. C.'s was necessary.

It should be noted further that the National Association of Swine Records and the National Swine

Growers Association are composed of the most prominent hog men of the country, that the judgment of its committee was not rendered in the interests of any litigation or party, but solely and wholly to carry out its own independent purposes.

(h) *Experts on the characteristics which distinguish one breed of hogs from another breed are unable to tell any difference between the O. I. C. and the Chester White.*

It is the general consensus of opinion that there is absolutely no difference between representative specimens of O. I. C. and Chester White. W. J. Carmichael at one time for several years in charge of swine husbandry at the University of Illinois, and who acted as Judge of Swine at many fairs at which O. I. C. hogs were exhibited with Chester Whites, and who has bred Chester Whites for the University—Testified that he has never seen any specimens of Chester Whites and so-called O. I. C.'s which he could distinguish the one from the other by characteristics which would lead him to determine to which species the hogs belonged. He has never been able to tell any difference between the two kinds of hogs as to individuals or pedigree. P. 1173 and 1254 of the Record.

Willis Whinnery, an expert on Chester Whites, and for many years a breeder of O. I. C.'s for L. B. Silver testified that he is familiar with O. I. C.'s and Chester Whites. He cannot tell any difference between the O. I. C. and Chester White hogs if the manner of raising them is the same. They are practically the same breed. There might be a little difference in the type of one breeder over another. A regular breeder that is posted is a little more careful in breeding a type than farmers are who are raising pigs and who have no incentive to breed for type. That is the only difference witness would know. There is no difference between the O. I. C.'s and the Chester White. They are from the same ancestors. The foundation stock of the O. I. C.'s so-called are found in the various records of Chester Whites in which the foundation

stock of the Chester Whites is found. Page 1428 of the record.

William McFadden, secretary of the American Poland China Record Association, a breeder of hogs for over 40 years, and at one time a breeder of Chester Whites, declares there is no difference between the O. I. C. and Chester Whites. This opinion of the witness was confirmed by the evidence which Carl Silver and O. C. Vernon gave when they appeared in behalf of the petition of the O. I. C. Swine Breeders' Association for membership in the National Association of Swine Records as an Association recording a breed of hogs different from the Chester Whites. This petition it will be remembered was denied by the National Association of Swine Records after a full investigation of all the evidence and due deliberation thereon. See page 1371 of the Record.

Professor Gay, professor of Animal Husbandry in Ohio State University and who lived for years in Chester County where the Chester Whites originated, who has judged hogs at swine shows, and is thoroughly acquainted with the distinguishing characteristics of different breeds of hogs is unable to note any difference at all between O. I. C.'s and Chester Whites. He testifies that if two hogs, one a so-called pure bred O. I. C. and the other a pure bred Chester White were placed together and no one told him anything about them, he would be absolutely unable in any way whatsoever to distinguish between them as animals of different breeds, either by their appearances or characteristics. See page 641 of the Record.

Professor Tomhave, head of swine husbandry at the Pennsylvania State College, thoroughly agrees with all of the statements of professor Gay. Both also declare that they do not know of any fairs where O. I. C.'s are classified as a breed different from the Chester Whites. He cannot tell any difference between them. Page 296 of the Record.

M. J. Lawrence, a live stock raiser for over 40 years, and a man who was a personal friend of L. B. Silver, says he cannot tell any difference between the

O. I. C. and the Chester White. See page 67 of the Record.

J. C. Hiles, on cross-examination at pages 1828-9 says that he can tell the difference between a Chester White and an O. I. C. depending upon the type referred to; that there are two types of Chester White, the old fashioned Pennsylvania type and the type that is now called the Improved type, the Improved Chester White Type. They don't call them a breed but they used to advertise Improved Chester Whites. They did not distinguish them as a breed from the old fashioned Pennsylvania Chesters. Particular breeders used to advertise Chester Whites, shown at various fairs, as Improved Chester Whites. "I cannot tell the difference between the modern Chester Whites and the O. I. C.'s. I do not know any judge that can tell the difference between the two." Page 1829 of the Record.

Carl Silver himself, as a careful reading of his testimony shows, is not able to distinguish between the modern Chester White and the modern O. I. C.'s. See his testimony on pages 2830 et sequitur of the Record, also page 2575.

Finally Dr. Davenport, petitioner's expert witness on breeding, stated that a breed must have some characteristics which distinguish it from another breed of the same kind of animals, and that "if there is no difference between the breeds that can be expressed or stated, then I think it must be regarded as the same breed." Page 2341 of the Record.

On this test and on the testimony of the witnesses the O. I. C. must be declared to be the same breed as Chester Whites.

(i) *The score card of the Chester White and the so-called O. I. C. is the same. This fact is strong evidence that the O. I. C. and the Chester White are one and the same breed of hogs.*

The score card for the O. I. C. has been practically identical with that of the Chester Whites since its earliest days. Previous to the formation of The International O. I. C. Record, the score card of the

O. I. C. and the Chester White was identical. When the association for that record was formed in 1894, the O. I. C.'s continued to use the score card adopted by the Chester Whites. It is set out on page 43 et sequitur of Volume A, International O. I. C. Record Commission's Exhibits, Nos. 501, 530, 229. Therein, page 51, 3rd full paragraph of "Remarks," they give full credit to the Chester Whites for the origin and use of that score card to the Chester White people.

The O. I. C. Swine Breeders' Association, organized in 1897, published its first record volume in 1898, and adopted and used until 1905 the same score card. In that year there was adopted a slightly different score card. Volume 8, Commission's Exhibit, No. 212. In 1913 the O. I. C. Swine Breeders' Association and the Chester White Swine Record Association adopted the same score card and that has been used by both ever since, and has been published for use in all the volumes of the O. I. C. Record printed since that date. See pages 2855 to 2870 of the Record. It is to be found in Volume 20 O. I. C. Record, Com. Ex. No. 31, See Vernon, page 2153 of the Record.

William Jerome Carmichael testified, as an expert in matters pertaining to swine record, that every breed association in connection with the rules for recording has a score card or standard of excellence for the improvement of swine. The official score card for any particular breed describes the outstanding characteristics of that breed as a whole. He further stated if two alleged breeds should use the same score card it would indicate to the witness as an expert that the two so-called breeds were one and the same, page 1205 of the Record, and that if it were shown that the O. I. C. and the Chester White use the same score card that fact would be a very strong indication that the O. I. C. and the Chester White were one and the same breed; that no two breeds that witness knows of use the same score card and he does not think that possible in any breeds

he knows of. Page 1205 of the Record. See also to the same effect, Prof. Gay, page 648 of the Record.

Prof. Plumb testified that he has a booklet No. 3 of the Chester White Record Association which was published in 1914, containing a score card which states that the scale of points, as adopted by the Chester White Record Association, at its adjourned meeting held in Chicago, on Dec. 1, 1913, was the same as that adopted by The O. I. C. Swine Breeders' Association at its regular meeting held in Chicago, Dec. 3, 1913. In the publication of the O. I. C. Swine Breeders' Association, Goshen, Indiana, which is undated, so far as the title page is concerned, they have, "The latest revised score card, standard of perfection, scale of points adopted by the O. I. C. Swine Breeders' Association at its regular meeting held in Chicago, Illinois, December 3, 1913." Commission's Exhibits Nos. 424 and 425.

The witness further said, "Now I have compared the scale of points as published by these two associations, and they are identical." Page 1570 of the Record. Mr. Carl Silver's name is down here as a trustee of the O. I. C. Swine Breeders' Association. "The fact that the score card for the O. I. C. and the Chester White are the same" is indisputable evidence offered by each association that they are handling one and the same breed. Prof. Plumb, Page 1572 of the Record.

The witness Wade for the defendant admitted that at the White Breeders' Congress, December 3, 1913, the O. I. C. Swine Breeders' Association, represented by himself and others, and the Chester White, represented by still others, agreed upon and accepted a score card to be used by both the Chester White and the O. I. C. for judging O. I. C.'s and Chester White. Page 1966 of the Record. This score card remained upon the record books of the O. I. C. S. B. Association. Page 1981 of the Record. Witness Wade for defense said he does not know of any other two breeds that use a common score card. Page 1981 of the Rec-

ord. A Judge, while he does not physically hold the score card while judging in the show ring because he does not have time to use a score card, uses the score card knowledge, however. Page 1982 of the Record.

(j) *The Canadian Government now considers, and always has considered the O. I. C. Swine Breeders' Association as an association recording only Chester White swine.*

As evidence to support this point of the Government's brief the attention of the Commission is invited to Commission's Exhibit No. 221, being volume 30 and the 1919 edition of the report of the Canadian Swine Breeders' Association, and Commission's Exhibit, No. 222, the 1919 edition of the report of the Canadian Live Stock Records, and in connection therewith to the testimony of Wilbur Jerome Carmichael. Witness Carmichael is a B. S. and a M. S. of the University of Illinois. In 1916 and 1917 was Professor of, and in charge of, Swine Husbandry Teaching and Investigational swine work in that University. In 1919 he was made Secretary of the National Association of Swine Growers. Page 1167 of the Record.

Witness Carmichael testified that he is acquainted with the Canadian records for recording swine. He produced volume 30, of the Canadian Swine Breeders' Association Report, Commission's Exhibit No. 221, which contains the pedigrees of all breeds of swine recognized by the Canadian National Live Stock Records and which is conducted under the Canadian Government's supervision and control. This exhibit was sent to witness Carmichael under the Canadian Government frank by J. W. Brandt, accountant of the Canadian National Live Stock Records. The witness also produced the 1919 volume of the Reports of the Canadian National Live Stock Records, marked Commission's Exhibit No. 222, which was given to him by Mr. Brandt in Toronto, Canada, in February, 1920.

As an expert on swine records, witness Carmichael testified, as follows:

"I find in both of these volumes information which leads me to believe that the Canadian Swine Breeders' Association and the Canadian National Live Stock Records, which are identical to the extent that the Canadian Swine Breeders' Association is a member of the Canadian National Live Stock Records, consider the so-called O. I. C. and Chester White to be one and the same hog." Page 1188 of the Record.

The matter and things in each of those volumes which leads the witness to this conclusion is stated in the following language of the witness:

"On page 31 of Exhibit 222, I find that in the report of the number of pedigrees (hogs) recorded to December 31, 1919, and the swine recorded in 1919, the number of Chester Whites is given, and the number of so-called O. I. C. is not given. On page 30 I find the list of men who purchased Chester White hogs from Breeders in the United States in 1919. In that list I find the name of L. J. Renz, Forward, Saskatchewan, who is credited with having purchased one boar and one sow from a United States breeder.

"In referring to Exhibit 221, I note on page 514 the pedigrees of two hogs—one which has been assigned to number 19889, Alton B. 83283 O. I. C., Male—Born March 28th, 1919, bred by The L. B. Silver Company, Salem, Ohio, U. S. A.; second owner, L. J. Renz, Forward, Sask.; sire Marciste 69763 O. I. C., dam Ruidoso O. I. C.

"The next animal appearing on page 514 is number 19890, Canada Queen, 83284 O. I. C., Female—Born March 25th, 1919, bred by the L. B. Silver Company, Salem, Ohio, U. S. A.; second owner L. J. Renz, Forward, Sask.; sire Ford Sterling 59571 O. I. C., dam Ruia 81241 O. I. C."

The dam and sire which witness read were both marked O. I. C. and the progeny, Canada Queen, is recorded by the Canadian Government as a Chester White. The two hogs mentioned on page 36 of Commission's Exhibit as having been purchased by L. J. Renz in the United States are the two hogs described on page 514 of Commission's Exhibit 221. Page 1190 of the Record.

The witness testified he knew this was true because

"I asked Mr. Brandt, from whom the hogs imported into Canada were purchased, and he informed me that the list of United States breeders was not published, in connection with their report of the record committee; but that all animals which had been imported during the year, which had been recorded, were recorded in the last volume of the Canadian Swine Breeders' Record, which covered the full year's work. And, since Mr. Renz imported but two hogs during the year 1919, and since in the pedigrees of those two hogs as found on page 514 of Exhibit 221, were farrowed in March, 1919, those are the identical hogs referred to in Exhibit 222." Page 1191 of the Record.

There is another thing in Commission's Exhibit number 221, that leads witness to believe that the Canadian Government regards the O. I. C. and the Chester White as one and the same breed. He says, page 1195 of the Record:

"In the fore part of the book, entitled, 'Constitution and By-laws,' on page Roman 14, find under section 6, which is a continuation of the rules of entry beginning on page Roman 13, that they have listed the breed Chester White with the following rules for recording:

'(a) The sires and dams of animals which are recorded in the Canadian Swine Breeders' record.

'(b) Animals recorded in the O. I. C. Swine Breeders' Association record, United States.'

“The general clause under the rules of entry covering the Chester White as well as the other breeds listed there is as follows: ‘The following animals may be admitted to registry.’”

This matter leads the witness to believe that the O. I. C. and the Chester White are regarded by the Canadian Government as Chester Whites because, page 1196 of the Record,

“In this particular portion of the book, and throughout the entire volume, the breed heading is given as Chester White. The rules of entry permit hogs recorded in the O. I. C. Swine Breeders’ Association to be recorded as Chester White hogs.”

Furthermore, page 1197

“In the two pedigrees which I cited yesterday, the initials after the American registry number are ‘O. I. C.’ I find that in the case of all hogs recorded in United States records, and appearing either as the individual recorded or as the ancestor of an individual recorded in the Canadian records, the initials of the record are used, and in no case do I find where they have used the name of the breed.

“For instance, in the case of a Duroc-Jersey recorded on page 691 of exhibit 221, the animal recorded as number 12928, Lady Beaut 4, 772330 N, indicating that the animal was recorded under that number in the National Duroc-Jersey Record Association of the United States. Then again on page 831 of the same book, animal number 11236 has given in the pedigree as its sire Much Cole. Principal 2, 7881-83737-A, indicating that sire of animal 11236 was recorded in the American Duroc-Jersey Swine Breeders’ Association record of the United States. It is customary in the records in the United States, where there are two records for a single breed, to put the initial of the first word in the name of the association, or the key-note words of the associa-

tion following the number of the animal, in order to enable one to note readily what record association the animal had been recorded in. I know of no case in which the initials denote the kind of breed, other than the information which you would get by knowing that that association was of a particular breed. In my opinion they indicate the name of the record, and not the name of the breed."

Another thing in Commission's Exhibit No. 221 that leads the witness to believe that the Chester White and the O. I. C. are one and the same breed is this:

"I note the names of the men, who have hogs recorded in that volume, are classified according to the breed which they have recorded. The breeders for Chester Whites appear beginning with unnumbered page, presumably 891, entitled, 'Chester White breeders and owners,' and continues through page 901. Then again on pages 793 to 806, inclusive, I find the Chester White animal index, and in the index of this volume I find no place where they have listed the so-called O. I. C. breed as a breed by that name."

The name of L. J. Renz appears on page 899 in the second column of names of Commission's Exhibit 221, in the list of those purporting to have imported Chester Whites in 1919 from the United States, and which is mentioned on page 36 of Commission's Exhibit 222. Page 1200 of the Record.

"In examining the Chester White pedigrees contained in that book, I find that the pedigrees numbered 19889 and 19890 as appearing on page 514 are two hogs farrowed in March, 1919, bred by the L. B. Silver Company, Salem, Ohio, and as indicated are also regarded—I mean recorded in the O. I. C. Swine Breeders' Association."

Furthermore,

"In exhibit number 222 (page 1201 of the Record) on page 64 I find in the portion of the book beginning on page 61, which is entitled, 'Animals from other countries that are eligible for registration in the Canadian National Live Stock Records,' on page 64 which I cited, the various breeds of swine are listed, together with the names of the record associations which are recognized, and under Chester White it states, 'Animals recorded in the O. I. C. record, United States, fees same as Poland-China.' That is all that I have found in those two volumes relative to the subject."

"When I was in Toronto on February 3d, I was talking with Mr. Brandt. Mr. Brandt is accountant of the Canadian Live Stock Records,—and I asked him questions relative to the possibility of getting the Canadian Government to recognize all of the swine records in the United States, and he informed me that it was the policy of the Canadian Government to recognize wherever possible only one record association for each breed of hogs. They have one exception in the case of hogs; that is in the case of Duroc-Jerseys, in that they recognize both the American Duroc-Jersey record and the National Duroc-Jersey record of the United States. He informed me that it was their policy wherever possible to recognize the oldest and the largest record, but he said that they had not followed that out very consistently all of the way through, and in the case of the Durocs in particular, they had originally recognized the American record because it was the oldest, and that since the National Duroc-Jersey record was larger than the American they had later added it to their list." Page 1203 of the record.

"I asked him specifically whether he considered the O. I. C. or the so-called O. I. C.

hog as a separate and distinct breed from the Chester White, and he told me that in their minds there was no difference between the two so-called breeds; that they were one and the same, and that that was their reason for recognizing but one record association. I may say that that conversation with him was in a meeting of a portion of the record committee of the Canadian Live Stock Records, and Mr. J. E. Brethour of Buford, Ontario, was present at that meeting, also a Mr. Wade whose initials I do not recall."

The Canadian National Live Stock Records are the official Canadian Government Records. Witness Carmichael testified:

"It is my understanding that they are the official records, particularly since Mr. Brandt informed me that the Canadian National Live Stock Records were under government supervision, were housed in buildings owned by the government, were furnished stationery by the government, and are given the use of the government frank on all literature and correspondence from their office." Page 1204 of the Record.

The fact that the Canadian Government after careful consideration of the matter by its swine authorities recognizes the O. I. C. Swine Breeders' Association to be an association recording Chester White Swine is strong evidence that the O. I. C.'s and the Chester Whites are one and the same breed. That position of the Canadian Government is supported by the statement of the O. I. C. Swine Breeders' Association, that "The O. I. C. Record is a Chester White Record." See Commission's Exhibit, No. 15. Pages 295 and 642 of the Record.

(k) *Indeed, the people of the locality in which The L. B. Silver Company's principal place of business is situated regard the O. I. C.'s and the Chester Whites as*

one and the same breed of hogs and consider the terms synonymous:

Dr. Chauncey McCandless, who has practiced as a veterinary since 1915 in and around Salem and Lisbon and Columbiana County, Ohio, testified that he has always been of "the impression that the O. I. C. and the Chester White was one and the same hog." (Page 1535 of the Record.)

William G. McCann, whose business is that of farmer and stock-dealer, and who buys and ships all kinds of live stock, including hogs, in Columbiana and Mahoning Counties for the past fifteen years, testified that the people in Columbiana and Mahoning Counties who sell hogs oftentimes called the O. I. C. hogs Chester Whites, and says that the names Chester White and O. I. C. are used by the people in that locality and, in the locality in which he purchases hogs in Columbiana and Mahoning Counties, are used to designate the same hogs, or kind of hogs. This man is acquainted with practically every farmer in that vicinity. Sometimes when he was buying hogs from a farmer the farmer would one time refer to them as Chester Whites and the next time speak of them as being O. I. C.'s, though they were hogs of the same litter. (Page 3173 of the Record.)

Joseph E. Walton, Page 3205 of the Record, engaged in farming and stock-raising and in buying and shipping stock for about thirty years and who has been for many years a public sales clerk, says that he has heard Chester White hogs called by the owners at public sales O. I. C.'s and also Chester Whites (Page 3209 of the Record), that he himself bought hogs in that locality from the breeders for the L. B. Silver Company and that these breeders in selling them to him sometimes called them Chester Whites and sometimes O. I. C.'s, and that the names O. I. C. and Chester White in that locality were used interchangeably for the same kind of an animal, and that they were common terms in public sales in his business and by breeders. (Page 3213 of the Record.)

This man has judged and scored hogs at fairs, and he has never been able to distinguish any difference between the so-called O. I. C. and the Chester Whites in his part of the country.

B—THE PETITIONER HAS MADE A PRACTICE IN ITS ADVERTISING LITERATURE OF OFFERING CHESTER WHITE PIGS FOR SALE, WHEN AN ORDER FOR THEM IS RECEIVED IT REFUSES TO FILL THE ORDER ON THE GROUND THAT IT EITHER IS ALL OUT OF CHESTER WHITES, OR THAT IT HAS DISCONTINUED SELLING THEM. AT THE SAME TIME OF REFUSAL TO ONE PROSPECTIVE CUSTOMER IT OFFERS TO ANOTHER TO SELL CHESTER WHITES.

The petitioner under the direction and management of its star witness, Carl Silver, had still another method of competition with straight Chester White breeders. It has been its practice for many years, in its literature advertising O. I. C. hogs for sale in competition with Chester White breeders, to offer Chester White pigs for sale at greatly reduced prices. If the customer sent, in reply, an order for the Chester Whites instead of O. I. C.'s, it was the petitioner's practice to make another endeavor by a follow-up-letter to persuade the prospective customer to accept O. I. C.'s instead of the Chester Whites ordered. If the customer still insisted on having the Chester Whites, the petitioner would either state that it was at present all out of Chester Whites or that it had discontinued handling them.

This practice alone is unfair to the breeder and seller of the Chester Whites. But this is not all of the method. At the very time the petitioner, through its manager and witness Silver, is stating to one prospective customer that it either is temporarily out of Chester Whites or that it has discontinued selling Chester Whites, it offers Chester Whites to other prospective customers, all to decry the Chester Whites breed of hogs and "to emphasize his claimed distinctiveness for his own so-called 'herd' from Chester Whites."

The practice is illustrated by the following case: On April 15, 1916, The L. B. Silver Co., Carl Silver, President and General Manager, sent a letter to Forest Willoughby as an answer to a No. 1 inquiry, stating therein "we continue to sell the \$25 Chester White pigs at \$20. a pair. These are not the O. I. C.'s by any means, but the same as the Chester Whites sold in Pennsylvania and elsewhere." See Commission's Exhibit No. 507. Page 2723 of the Record. Not hearing from Mr. Willoughby, the petitioner sent on April 27, 1916, another letter to him, Commission's Exhibit No. 508, stating therein, "In our first letter to you, we offered you a \$25 pair of Chester White pigs for \$20. While we guarantee thoe as good as are sold by any breeder, yet these are not the O. I. C.'s by any means." Page 2725 of the Record. On May 16, 1916, the petitioner received a letter from Mr. Willoughby offering to buy a pair of Chester Whites from the petitioner and enclosing a \$20 check in payment of the same. Commission's Exhibit, No. 509. The witness, Carl Silver, as President and Manager of the petitioner, replied to this letter by writing to Mr. Willoughby on May 19, 1916, a letter returning the \$20 check, and stating therein "we are sorry to inform you that we are entirely sold out of Chesters at present and will be unable to fill your order." Commission's Exhibit No. 510, pages 2728-2729 of the Record, and offering to sell O. I. C.'s at a reduced price and throw in a \$5 case of the celebrated Silver Live Stock powder.

About this very time when Carl Silver, as manager for the L. B. Silver Company, was declining to sell Chester Whites, he was also offering other prospective customers to sell them Chester Whites. For instance, on May 15, 1916, John J. Fraser acknowledged two offers, Commission's Exhibits Nos. 512 and 513, from the L. B. Silver Co. to sell Chester Whites, see Commission's Exhibits No. 511, copy, and No. 535, original, and accepted the offers and enclosed part payment therefor. On May 16, 1916, the peti-

tioner, by Commission's Exhibits No. 515, original, and No. 534, copy, wrote that the petitioner was entirely sold out of Chester Whites at present, and offering O. I. C.'s at a greatly reduced price, from \$45 a pair to \$33.75, including a \$5 case of the live stock powder. On May 20th, 1916, Mr. Fraser writes that he still desires Chester Whites and asks the petitioner at what it can furnish them. Commission's Exhibits, No. 516, copy, No. 533 original. But in reply thereto, the petitioner writes, "we have your favor of May 20th and note what you say. We have decided to discontinue the breeding of Chester Whites and consequently would not be prepared to accept your order for a pair of the same." See Commission's Exhibits No. 532, copy, No. 517, original.

Nevertheless, on July 19, 1916, the petitioner in answer to a letter from F. E. Carithers, Rochester, Indiana, inquiring about O. I. C.'s offers in the following language to sell to him some Chester Whites: "We continue to sell the \$25 Chester White pigs at \$20 a pair. These are not the O. I. C.'s by any means, but the same as the Chester Whites sold in Pennsylvania and elsewhere." See Commission's Exhibit, No. 518.

The explanation of Carl Silver is that the Chester Whites were kept as a "Stool pigeon." Page 2778 of the Record. Which means that he used his references to Chester Whites to attract the attention of people in the market for Chester Whites and then persuade them to buy O. I. C.'s instead. The subtlety of this persuasion lies in the fact of his belittling the Chester Whites by offering to sell a \$25 pair for \$20 while he charged \$45 for a pair of the O. I. C.'s. By this difference in price between the O. I. C. and the Chester Whites, and by the offer to reduce price of the latter, the petitioner endeavors to suggest a decided difference in quality between the two, and this suggested difference it also tries to further magnify by the additional statement, "these are not the O. I. C.'s by any means." This unfair method of meeting the pressing competition of the Chester White breeders is

made the more unfair by the accustomed practice of the petitioner in filling orders for the Chester Whites by sending not representative animals of the modern Chester Whites, but by filling orders with the type of Chester White in vogue long ago, or else refusing to send any at all.

This practice amounts to disparagement of competitors' goods. Mentioning the name of a competitor's goods in a disparaging false way is unfair competition. The statements made are more than mere puffs they are definite statements of fact. They are untrue. And the conduct of the respondent in using them shows a malicious intent to injure Chester White breeders and to prevent them from selling their hogs. Such conduct as that is considered unfair competition. *Lyne v. Nicholls*, 23 Times Law Reports. 86; *Trust Laws and Unfair Competition*, page 385. *Federal Trade Commission v. Muenzen Specialty Co.*, 1 Fed. Tr. Co. Decisions, page 30.

C—THE RESPONDENT FALSELY CLAIMS AND ASSERTS IN ITS ADVERTISEMENTS, CIRCULARS, BOOKLETS, PAMPHLETS, LETTERS AND OTHER MATTER SENT THROUGH THE MAIL IN COMPETITION WITH VENDORS OF DIVERS BREEDS OF HOGS THAT THE HOGS IT SELLS ARE NOT LIABLE TO CHOLERA AND OTHER CONTAGIOUS DISEASES, AND THAT THERE HAS BEEN NO CHOLERA, FOOT AND MOUTH NOR ANY OTHER CONTAGIOUS DISEASES IN RESPONDENT'S LOCALITY FOR OVER 50 YEARS.

(a) *The claim of the respondent that the so-called O. I. C.'s are not liable to hog cholera, tuberculosis, foot and mouth and other contagious diseases is false, misleading and deceiving to the public, and unfair to other hog breeders.*

The L. B. Silver Co. has for years and is now advertising that the so-called O. I. C. hogs are not liable to hog cholera, foot and mouth, or any other contagious disease.

The attention of the Commission is first invited to the following advertisements of this claim. A circular marked Commission's Exhibit No. 28, contains many assertions on this point. Let us take up the first one. "The L. B. Silver Co. originators of the famous O. I. C. swine. The coming hog. Not liable to cholera."

Paragraph 8th on page 3 recites: "*Last but not Least*—They are not liable to cholera and other diseases as are the black or dark hogs. This has been demonstrated many times, especially throughout the western states."

Immediately below it is stated: "While we do not guarantee that the O. I. C. hog might not contract cholera under unfavorable conditions, yet we do claim that the genuine O. I. C.'s possess a power to repel disease in a degree unknown to other breeds."

The first sentence on the top of page 4 declares that, "In sections where the black hogs are swept off by thousands, these were unaffected."

And finally, and on page 5 in heavy type, the trusting public is informed that "since it is becoming extensively known that the O. I. C.'s are not prone to contract cholera and other diseases as are other breeds, the demand is wonderfully on the increase, and their popularity is no longer confined to the United States, but it is becoming almost world-wide."

It is submitted in behalf of the Government that every one of these statements is absolutely false and misleading. They mean and are intended to convey to the purchasing public, that the O. I. C.'s are immune from devastating diseases such as hog cholera, foot and mouth, tuberculosis and other contagious diseases. Dr. Dorset, page 466 of the Record. Prof. Plumb, page 1573. That such statements are not only unfair to breeders of Chester Whites, but to breeders of all other kinds of hogs. Prof. Plumb, Page 1577. And, furthermore, they lead the unsuspecting and the inexperienced hog buyer to believe that in buying an O. I. C. hog they

are buying an animal practically immune and disease resisting. Prof. Plumb, Page 1576 of the Record.

The true facts are that no breed of hogs has the advantage over any other breed in the matter of resisting any of the diseases mentioned. All hogs, dark and white, red or black, are equally susceptible to their destructive powers.

Among the witnesses who testified for the Government along these lines is Dr. Marion Dorset, Chief of the Bio-Chemic Division, Bureau of Animal Industry, Department of Agriculture, Washington, D. C. This scientist, and his co-worker, Dr. U. S. Houck, Chief of the Division of Hog Cholera Control, also a witness, are probably the greatest and best known experts in America on hog cholera, foot and mouth, and other contagious hog diseases.

Dr. Dorset has been for 26 years connected with the Department of Agriculture, and all that time doing research work principally along the lines of animal diseases. Almost from the time he entered the department in 1894 he has been engaged in the study of hog cholera and other hog diseases, and since 1904 he has been directing all of the research work on hog cholera and other swine diseases conducted by the Department of Agriculture. In 1905 Dr. Dorset discovered the cause, and later the method of preventing hog cholera. The witness holds a patent from the United States Government of the serum method of artificially producing immunity in hogs against hog cholera. There is no other method by which hogs can be immunized artificially. All rights to the full use of this patent were by the witness assigned to the public. The witness testified that all breeds of hogs, all types of breeds, all strains of breeds, are each equally susceptible to hog cholera. He knows of no breed of hogs that is more resistant than another. Page 462 of the Record. Of this witness, Dorset, the petitioner's attorney, on page 479 of the Record, says: "he has shown he knows a great deal about hog cholera." Exhaustive experiments made for many years by the hog cholera

experts, Dr. Marion Dorset and his co-workers, of the United States Department of Agriculture, show that it is impossible to develop a breed of hogs resistant to hog cholera.

Individual hogs may be found in any breed of hogs anywhere that will be resistant to hog cholera. And they will be immune. They will not succumb when they are exposed to hog cholera. Page 466 of the Record. It appears to be the fact also that hogs which have recovered from an attack of hog cholera are thereafter often immune to hog cholera. And the progeny of sows, but not of boars, page 473 of the Record, that have derived their immunity from an attack of hog cholera, or from vaccination in such form as to give them immunity, are immune from birth, and remain so for some weeks thereafter. Page 467 of the Record. This immunity which results from a successful recovery from an attack of hog cholera, and that immunity which results from the serum and virus treatment is a life long immunity, and is called active immunity. The sows will transmit to their offspring a passive immunity which ends with the cessation of nourishment from the mothers. This passive immunity does not last longer than six months, page 469 of the Record, and ends before the pigs are able to reproduce. Out of this progeny "you might find individual pigs that would be immune for" six months after birth, "and, perhaps, for life, but they wouldn't get that immunity as a result of coming from an immune mother, but it would be an individual characteristic from that individual pig, which we observe in all herds at times." Page 469 of the Record.

Progeny of passively immune pigs will not produce pigs which will be immune. Page 469-470 of the Record. "I have made a great many experiments in attempting to perpetuate immunity in pigs. I have taken actively immune hogs, hogs found to be immune, and these pigs were bred, an immune sow and immune boar, and their progeny were reared to a certain age, and then exposed to hog cholera, put in

pens with pigs that had the disease, and a certain percentage would survive. The survivors were carefully saved and bred. From them pigs were raised. We carried this through several generations and we found that most of these pigs always died and at the end we had to stop our experiments, because we ended with no pigs at all, because the disease finally killed them off." Dr. Dorset, page 470 of the Record.

Individuals of breeds of hogs will sometimes show immunity because of the individual idiosyncrasy or constitutional peculiarity of the animal and not from any treatment that they have received. They are freaks of nature. Page 471 of the Record. Breeding experiments have been made with animals of this class of immunity in the attempt to develop a hog resistant to cholera. But "we have been unable to establish any race or type or variety of hog that possesses constant immunity against hog cholera. In fact the immunity characteristic did not seem to be developed by this breeding in any way." Page 471 of the Record. Hogs that are immune because they have the individual characteristic of being immune, and not from treatment, will transmit their "natural immunity in a passive form, but it will last but a short time, certainly, in my opinion, not beyond weaning time." Page 472 of the Record. So that their progeny certainly could not give birth to immune progeny. Page 473 of the Record.

In these "breeding experiments that we carried on with hogs that were immune * * * we used hogs that in some of the cases, sows and boars, had been exposed to hog cholera at some time, which we knew of, and which we believed to be representative of these natural immunes, and we bred from them, and their progeny died of hog cholera, and we kept on with the few survivors from the litters we got in this way, and we bred these together and got second and third generations, but eventually they all died of hog cholera." Page 473 of the Record. It must be remembered too that the sows only and not the

boars, transmit hog cholera immunity. Page 473 of the Record.

"In carrying out these experiments," testified Dr. Dorset, "we have used hogs of all colors, kinds and descriptions, black, white and red. * * * Our main object was to get susceptible pigs, pigs that would—you see, in experimental work, it is very necessary to be sure that the pig will take cholera, and we reserve a certain number of pigs as controls, and we want to be sure the control will succumb, so that we must get susceptible pigs. We have not been guided by color in getting the pigs, although we have been rather partial to the white hog, * * * We have always been glad when we could find a herd of nice white shoats." Page 474 and 475 of the Record.

This phase of the experiments shows how unfair it is to breeders of hogs that were not white. The advertisement of the petitioner states, page 3 of Commission's Exhibit No. 28, "LAST AND NOT LEAST, they are not liable to cholera and other diseases as are the dark or black hog," and also "In sections where the black hogs are swept off by thousands these"—meaning the O. I. C.—"were unaffected."

These exhaustive experiments made over a number of years by eminent hog cholera experts show that it is impossible to create a cholera resistant breed or type of hog. For the respondent to attempt by its publications to create the belief that it has such a breed or type in the so-called O. I. C. is not only a ruinous fraud upon the public in general, but interferes with the work of the Department of Agriculture, and is a most vicious method of unfair competition, against which the sellers of all other hogs are powerless.

Dr. U. G. Houck, B. S. and D. V. M. (Penn.) Chief of the Division of Hog Cholera, Bureau of Animal Industry, Department of Agriculture, has been in the service of the Bureau of Animal Industry since January 4, 1897, and Chief of the Division of

Hog Cholera since April, 1919. Page 543 of the Record. Dr. Houck, for many years before being called to Washington in April, 1917, heard of the field work against hog cholera and foot and mouth disease. He says in regard to the field work in foot and mouth disease, page 545 of the Record, "I had charge of the eradication work in the State of Michigan and Indiana where the original outbreak occurred. The nature of the work was to supervise the activities of the men on the force, and direct the efforts made in the States which consisted of diagnosing the disease, and slaughter of the affected and exposed animals, and their disposition, by burial and otherwise, and the cleaning and disinfecting of the premises on which the disease occurred, quarantining and enforcing the quarantine. While there the witness taught those under him and others to diagnose for foot and mouth disease. He had two veterinary assistants sent to him and immediately he went into the field and demonstrated to them the methods of conducting post mortems and the administration of the treatment, and the features in the diagnosis of the disease. And this was particularly true of hog cholera. As Chief of the Division of Hog Cholera Control, the witness says he directs, from the Washington office, the work in the field. "We have," he says, page 547 of the Record, "been carrying on," etc. He further says, page 546 of the Record, "I may say that in my present capacity I am directing the work in Ohio. We had about 8 to 11 men in that State working on hog cholera field work, during the past year."

This witness testified that he knows of no breed of hogs that is immune from hog cholera, foot and mouth or tuberculosis, or infectious swine diseases. Pages 550, 551 of the Record.

Dr. Houck distinguishes between sporadic diseases and contagious. The sporadic diseases are those which may be carried here and there and not in large groups, such as pneumonia, while a contagious disease is one that affects many animals in the community

from the spread of the virus from one to another. The sporadic disease will be produced by a local cause, while a contagious disease is one that is carried by a uniform virus from one place to another. Page 551 of the Record.

"Good care, housing, sanitation, will in most cases, make an animal more resistant to sporadic diseases, as for instance, general pneumonia, diseases of the intestinal tract, the helminthic diseases, the diseases of the genito-urinal tract, and that sort of diseases, but it does not affect the susceptibility of animals to a specific virus, like the virus of hog cholera." Page 552 of the Record.

The witness agreed that no matter how healthy an animal may be, no matter how sanitary the conditions may be under which he lives, page 552 of the Record, no matter how healthy the stock from which he is descended may be, the animal, if put where there is a contagious disease, especially after it is weaned, is just as apt to be affected by contagious disease, such as hog cholera, tuberculosis, foot and mouth diseases that hogs may have, as any animal that has not had careful bringing up, and had the ancestry history of the other ones. "That is true especially in regard to hog cholera and foot and mouth diseases." "It may be explained in a few words by saying that so far as I know there is no breed or strain of hogs, no matter how well they are kept, no matter what their ancestry may be, no matter what the sanitary conditions may be where they are kept, no matter how they are fed, there are none of them that are less susceptible to the virus of hog cholera and foot and mouth disease especially." Page 552 of the Record.

"The fact is that these animals, which are highly bred and carefully selected and mated and line bred, are not as resistant probably to the disease as the animal which is not so well cared for, and has to hustle for itself, and the attack of the disease in this case is usually more severe." Page 554 of the Record. In support of this statement, the witness

refers to Volume I of Huttyra & Marek on Pathology and Therapeutics and diseases of Domestic Animals, page 279, declaring "Line hogs of all breeds and of any age, may become affected with hog cholera, and higher bred stock and young hogs are much more susceptible to the disease," and declares that all of the authorities concur in that belief. Page 555 of the Record. He also is of the opinion that all breeds of hogs, all over the world, are equally susceptible to hog cholera and other contagious diseases.

On page 5 of Exhibit 28, near the middle, and in heavy type, it is stated: "Since it is becoming extensively known that the O. I. C.'s are not prone to contract cholera and other diseases as are other breeds, the demand is wonderfully on the increase, and their popularity is no longer confined to the United States, but is becoming almost world-wide."

The petitioner's attorney, page 490 of the Record, declares in reference to all of these paragraphs that if the advertisement "is false in one case, it is false in another." Witness Dorset testified: "Considering the word 'extensively' to mean generally over the country, or over a State, or a considerable portion of a State, I would say that I do not believe it is true," and is misleading. Page 490 of the Record. He is sure if it were true he would know it.

On this point, Dr. Houck, page 589 of the record, says: "I don't know that the O. I. C.'s are less prone to contract cholera than any other breed. I am in a most favorable position to learn if such were the fact, because we have about 143 men working on hog cholera work, entirely on hog cholera work, in 43 states during the past year. The fact would certainly be brought to the attention of the Bureau. It—the Bureau—doesn't know that as a fact." Page 589 of the Record. "It would not be any more true concerning other diseases than it would cholera." "I don't know that the O. I. C.'s are any less prone to contract cholera or any other

disease than any other breed," page 590 of the Record, "and if it were a fact, I would be likely to know about it." Page 591 of the Record. See also page 547 of the Record.

Witness Stone testified this statement is untrue. Page 762 of the Record. "They have not become popular on account of their cholera resisting or disease resisting qualities, according to any information I have ever received. I have traveled in every state of the United States to try to learn those facts." Page 764 of the Record. "To the possible uninformed, or in neighborhoods where such things have never been tried, it would cause them to buy. In fact, I have a number of letters received about such statements coming from new territories. For instance, the development of Georgia; the people have not been in the hog business, and when they went into the hog business, they went in whole-souled, and being cotton raisers that would cause them to buy such an advertised hog." Page 765 of the Record. Such statements would be unfair to other breeders of hogs because it puts information in the hands of the uninformed, that do not have access to rebuttal literature. It would cause them to buy the O. I. C. hog rather than some other breed, because of the misleading information. That would be discriminating and unfair against other breeds. Page 766 of the Record.

Prof. Plumb declared that he does not believe any one breed of hogs is any more exempt than another. He says as a hog expert that the effect on the general buying public of such statements as the above made in advertising literature would probably influence the man who is not posted on matters of this sort and would tend to mislead and deceive him as to the real facts, and would affect the business of men who were trying to sell on the basis of their intrinsic merits. Where one man will use that kind of literature and send it out to obtain trade and another man sells Chester Whites who does not feel he can honestly make such statements, in

regard to cholera, etc., the latter is at a disadvantage in competing with the man who will send out literature such as that sent out by the O. I. C.

Prof. Plumb believes that the average man who is buying or going to purchase from the party that makes the strongest representation to him, not only as to the breed, but as to the powers of resisting disease, and all other things being equal, the man who cannot make such statements is at a financial disadvantage with the man who feels he can make them. Indeed a very important argument in behalf of selling hogs today is the statement that the serum treatment has been used, on the basis that the hogs sold are exempt and not liable to have cholera. See pages 1573, 1576, 1577, and 1578 of the Record.

Hog cholera is the worst scourge that we have in the hog raising world. It causes more damage and kills more hogs than all other swine diseases put together. Swine dealers are hoping to get something resistant to that disease. Such a statement would tend to be misleading, especially to those who are hopeful of getting some resisting animal. See Dr. Houck, page 578 of the Record.

These advertisements of the L. B. Silver Company in reference to their alleged cholera resisting and other contagious disease resisting hogs, lead the people to believe that in buying an O. I. C. hog they are buying a hog which is immune to cholera, foot and mouth and other contagious diseases. A number of hog men, breeders of hogs and the greatest experts on hog cholera and other contagious swine diseases in America, have testified that no breed of hogs is less susceptible and more disease resisting than any other breed. The advertisement, therefore, is not true. It misleads the buying public by inducing it to purchase an animal which does not have the merit attributed to it and lulls the purchaser into a sense of security which is not warranted by the facts.

Thus throughout the country, purchasers are led to believe that they need not exercise that care to prevent occurrences of hog cholera which buyers and breeders of hogs of other breeds believe to be necessary. Such a situation is likely to promote the spread of hog cholera and other contagious swine diseases because the purchasers of the O. I. C. will not be inclined to use the double treatment for the prevention of that disease which is stated by all experts and authorities to be absolutely necessary. This of itself constitutes sufficient public interest to warrant an order against the respondent. Furthermore such a statement as these advertisements contain about the competitors of the respondent at an unfair disadvantage and these competitors are not confined to any one breed of hogs, but include all breeds of hogs other than the so-called O. I. C. so that we have here another phase of public interest.

And finally—furthermore, insofar as it is effective it interferes with and renders useless the efforts of the Bio Chemic Division of the Bureau of Animal Industry and the Division of Hog Cholera Control.

(b) *The petitioner has for many years stated at various times in its advertising literature and in red letters on the face of its envelopes, transmitted through the United States mails, that there has been "No cholera, foot and mouth, or any other contagious disease in our locality for over 50 years." This is untrue, and was untrue at all the times when published.*

Statements that there has been "no cholera, foot and mouth, or any other contagious disease in our locality for over 50 years" or words of similar import appear on Commission's Exhibits, Nos. 30 and 8, post-marked May 23, 1920, and June 1, 1920, respectively. The respondent has made such statements for years.

The locality in which persons are breeding and raising so called O. I. C. hogs for The L. B. Silver Co. and its predecessors consists of a stretch of territory thirty miles long by about twenty miles broad.

Within this locality there are at least 300 or 350 farmers all breeding and raising hogs for the company. See page 2549 of the Record.

Dr. Marion Dorset and Dr. U. G. Houck, eminent Government experts on hog cholera and other contagious hog diseases, testified for the Government, Pages 499 and 548, 594, that such a statement with reference to a locality in which hogs have been raised to any extent and for any length of time is not probable and is undoubtedly false and "calculated to mislead the buying public."

Dr. Theodore A. Burnett, State Veterinarian of Ohio since 1916, testified that his official duties require him to keep a record of cases of hog cholera, tuberculosis, foot and mouth, and other contagious animal diseases in the State of Ohio; that his field veterinarians, required by Ohio state regulations to report to the State Veterinarian outbreaks of hog cholera and other contagious animal diseases, have sent to him officially, reports of cases of hog cholera and tuberculosis of cattle arising in and around Columbiana County, Ohio. Thus from November 21, 1919 to May 1, 1920, one field veterinarian only, Dr. E. E. Stoner, sent in to Dr. Burnett reports of 142 cases of tuberculosis of cattle in Salem, Columbiana County, Ohio, alone. See Commission's Exhibits Nos. 413 to 421, inclusive.

Dr. Burnett also testified that there has been hog cholera in and around Columbiana County, Ohio, during his term of office. Page 1491 of the Record. In proof of this, refer to reports from Drs. Earl P. Maxwell, D. J. Frame, and B. C. Johnson, from Salem, Columbiana County, Ohio.

Dr. Earl P. Maxwell, D. V. M., 1915, Ohio State University and College of Veterinary, testified without contradiction, that on January 22, 1920, there was an outbreak of hog cholera on the farm of the C. E. Trotter Estate, about two miles from the center of Salem, Columbiana County, Ohio, in which the Estate lost 35 head of hogs from this disease, and that he filed a report of this with the State Veteri-

narian, Dr. Burnett. See Commission's Exhibit No. 410. That hog cholera was the cause of the death of these 35 hogs was determined by the witness Maxwell and Dr. B. C. Johnson, by post mortem examination of the dead hogs.

Dr. D. J. Frame, D. V. M., Ohio State University, 1909, and in active practice since then, testified without contradiction, that he is familiar with and can diagnose hog cholera, that there are plenty of cases of hog cholera in the State of Ohio, and that he has treated hogs in Columbiana County for hog cholera. In proof of this, he cites several cases, among them being cases of so-called O. I. C. hogs. R. p. 1522.

Dr. Chauncey McCandless, D. V. M., 1915, Chicago Veterinary College, has practiced as veterinarian since 1915 in and around Salem and Lisbon and Columbiana County, Ohio, and that some time six or eight weeks back from June 29, 1920, he treated hogs sick with hog cholera on the farm of the C. E. Trotter Estate near Salem, Ohio, and that he vaccinated many to prevent the further spread of and infection from that disease. That in May or June, 1920, he also treated hogs suffering from hog cholera near Lisbon, Columbiana County, Ohio, that he also treated hogs for hog cholera for another party near Lisbon, Columbiana County, Ohio. Furthermore, he testified that from 1915 until the time that he testified he has had numerous cases of hog cholera around that part of the country, amounting from 12 to 15 cases a year. He said that he had always been of the impression that the O. I. C. and the Chester White were one and the same breed, page 1535. Witness testified that he bought hog cholera serum from the State to use as a preventive of hog cholera and Commission's Exhibit No. 411 shows the amount that he bought within the period specified therein.

Dr. Leo. E. Davis is in the employ of the United States Bureau of Animal Industry, situated in Columbus as Inspector in charge of the cooperative work with the State Veterinarian on the control of

tuberculosis and hog cholera. His office has reports sent in to it by private veterinarians. Dr. McCandless with others, has sent in reports to him in conformity with the State regulations. Dr. Davis recognizes Commission's Exhibit No. 412 as a paper from which Dr. McCandless read and about which he was examined. The paper is a transcript from the reports made by Dr. McCandless on post card forms of hogs treated for hog cholera in Columbiana County. The exhibit is a correct transcript from these postal card reports and were compared by Dr. Davis with the originals so that he is sure of his own personal knowledge that the exhibit is correct. Page 1654 of the Record.

Dr. H. H. George, a witness for the petitioner, testified on cross-examination that hogs had died in and around Salem, Ohio, in 1916, 1917 or 1918, he could not tell definitely, and that a local veterinarian there, Dr. Shipman, had reported to Dr. George that these hogs had died of cholera, and that, upon Dr. Shipman's report, the statement in Commission's Exhibit No. 30, that there has been no cholera, foot and mouth disease, or any other contagious disease in respondent's locality for over 50 years "would not be correct." And that, though called by the petitioner to prove that there has been no hog cholera, foot and mouth disease, or any other contagious disease in petitioner's territory.

The most important witness called by the petitioner on this point was the above Dr. H. H. George. And, it will be remembered that he made examinations only for foreign shipments, page 2055 of the Record, and only six times during the course of the half dozen years, from 1914 to 1920. Furthermore the examination is made only within a radius of five miles of the origin of the shipment during the previous six months. Page 2056 of the Record. Again in making these investigations in and around Salem, it is customary for the witness to inquire of the farmers in the vicinity, whether or not they have had cholera within the previous six months. Page

2059 of the Record. As a general thing they profess ignorance of cholera. Page 2060 of the Record. Furthermore, when a certificate is made for the foreign shipment that there has been no contagious disease in that locality, swine only are referred to, not cows, other animals and people. Page 2061 of the Record. "The certificate simply covers hog cholera and swine plague. No other contagious diseases. I could not say that there was no other contagious hog disease, other than hog cholera and swine plague. Our investigations relate solely to hog cholera and swine plague." Page 2082 of the Record.

Dr. George's testimony therefore is limited to a small locality, for short periods, to two diseases only, and indistinguishable for each other, and for only six years, and is uncertain and inconclusive even on these points.

The positive and uncontradicted testimony of disinterested witnesses of such national, state and local reputation may be accepted as true.

D—STATEMENTS IN CIRCULARS HAVE BEEN MADE BY THE PETITIONER THAT "OWING TO OUR EXTENSIVE SHIPPING OF LIVE STOCK THE EXPRESS COMPANIES HAVE AGREED TO GIVE STOCK SHIPPED BY US SPECIAL RATES." SEE COMMISSION'S EXHIBIT NO. 504.

The notation on such circulars are absolutely without authority so far as any express company is concerned. Shipments of hogs by express are, and were at the time such circulars were issued, charged under the Official Express Classification, first class rates when crated, and no exceptions were made from Cleveland or any other point. All shippers of stock on all the Express Companies' lines have the same relative rates, and there is no discrimination whatever against any particular point, and in favor of any other point. All shippers at that time, and ever since have, paid the regular first class rate prescribed by the Interstate Commerce Commission.

No such statement as that made by petitioner could be further from the truth, for, the Commission and this Court may take judicial notice that the Interstate Commerce Commission law was created for the purpose of removing all such discrimination and granting the same rates to all shippers alike.

The rates applied by all the Express Companies on shipments of live stock forwarded by the L. B. Silver Company were the same as the express companies would apply on any other shipment of live stock out the respondent's shipping points, and no preferential rates were granted by the express companies.

E—FOR SOME YEARS AND UNTIL IMMEDIATELY PRIOR TO THE FIRST POST OFFICE INVESTIGATION OF THE L. B. SILVER COMPANY FOR ALLEGED FRAUDULENT USE OF THE UNITED STATES MAILS THE COMPANY ADVERTISED IN VARIOUS FARM JOURNALS THAT “TWO OF OUR O. I. C. HOGS WEIGH 2806 LBS. WILL SHIP YOU SAMPLE PAIR OF THESE FAMOUS HOGS ON TIME AND GIVE AGENCY TO THE FIRST APPLICANT.”

After the institution of that investigation the company changed the word “weigh” to “weighed” and the L. B. Silver Co.'s advertisements now declare that “Two of our O. I. C. Hogs weighed 2806 lbs.” See for one example Commission's Exhibit No. 105. The fact is that these two hogs were two unrecorded barrows which were alleged to have been sold in 1867 by L. B. Silver, the father of the witness, Carl Silver. The largest hogs used by the L. B. Silver Co. are not more than 500 or 600 lbs.

The unfairness of this advertisement lies in this: that it creates the impression that hogs now sold by The L. B. Silver Company are from animals of great size which is not the fact.

II. PARTICULAR STATEMENTS OF FACT IN PETITIONER'S BRIEF CONTROVERTED OR EXPLAINED.

In fairness to the Commission's case some observations must be made on the statements appearing in the brief for the petitioner, The L. B. Silver Company.

On the top of page 2 it is stated that—

“The kind of hogs originated and bred by L. B. Silver and his successors, was named the ‘Ohio Improved Chester White Breed’.”

That statement alone is some evidence on which to predicate breed identity between the so-called O. I. C.'s and Chester Whites. That phrase alone shows that the O. I. C.'s are nothing more than Chester Whites which L. B. Silver thought he had improved. Furthermore, down at the bottom of page 3 he admits—

“It is an undisputed fact that Chester White hogs were foundation stock of the Ohio Improved Chester White.”

If the foundation stock of the Ohio Improved Chester White is Chester White hogs the phrase “Ohio Improved Chester White” used to designate the O. I. C.'s shows that they are nothing more than a so-called improved Chester White. There is, therefore, no creation of a new breed. Improvement of breed without the introduction of new stock does not create a new breed. At the top of page 4 petitioner attempts to get around this situation by stating that L. B. Silver used the large or mammoth white English hog to mate with Chester Whites to produce the O. I. C.'s but the large English white hog was nothing more than the Yorkshire hog which Captain Jeffries brought over and which was used by breeders to create the Chester Whites. So that L. B. Silver (if he really did this, which is questionable and rests upon hearsay evidence and is nowhere so stated by him in his history of the breed) was not doing anything more than all of the Chester White breeders

were doing and they did not claim that they were creating a new breed.

On page 4—fifteen lines from the bottom—the brief states that the Chester White Association also admitted O. I. C. breeders to record in their herd book but that O. I. C. breeders only permitted Chester White hogs to be recorded in their books where they showed the characteristics of the O. I. C. swine and have a preponderance of O. I. C. blood. Vernon, the Secretary of the O. I. C. Swine Breeders' Association, says that they record them if they show 50% of O. I. C. blood and 50% Chester White (R. p. 2263).

If the O. I. C. and Chester White are really different breeds then admitting the O. I. C. pedigrees which show a percentage of Chester White blood as pure bred O. I. C.'s is working a fraud upon O. I. C. breeders, because O. I. C. hogs having Chester White blood in them admitted to be a different breed are grade hogs and not pure bred. In the case of no other breed of hogs do the breeders of one breed of hogs register the pedigrees of their hogs in the record or herd books of any other breed. Silver, himself, says on page 2603 of the Record:

"I do not know of any other instance in which there has been a case where the breeders of one breed of hogs have registered the pedigrees of their hogs in the records of another distinct breed."

And Carmichael, the greatest authority in the United States on swine records states that in all record associations with the exception of the O. I. C. the hogs must be 100% pure bred in order that their pedigrees may be admitted to record. (See R. pp. 1077-1089 and 1114.)

On page 7 of the brief in the paragraph designated (b) it is stated with regard to representations of non-liability of O. I. C. swine to hog cholera that—

"It had explicitly stated in its advertisements that it did not guarantee its hogs to be immune from cholera and other diseases."

The unfairness of the statement lies in the fact

that it is left to the reader to infer that this has ever been and is the constant practice of the petitioner but it is to be noted that this explicit statement of non-guarantee never occurred in its advertising before April 3, 1920 and that was after the two Post Office investigations and after the Commission had taken over the case. It never appeared in any of Silver's ads before and it does not appear in a subsequent ad (See Respondent's Ex. 105, dated April 15, 1920).

On page 8 of its brief the petitioner states that since the first day of 1918 it voluntarily and permanently discontinued all of the false representations as to special express rates. But here again it is to be noted that it did not do so until after the Post Office Department got after it for fraudulent claims in advertising of which this is one.

The *International News Company v. Associated Press*, 248 U. S. 215, is an answer to the first full paragraph on page 15 of petitioner's brief and the quotation at the bottom of page 15—"It is conceived that Congress," etc., is strong in our favor.

On page 16 the petitioner's brief quotes from the Circuit Court of Appeals for the Seventh Circuit that:
 "there must be some fraud in trade that injures a competitor."

(See 12 lines from the top).

The Commission claims that there is fraud in trade which injures a competitor.

On the bottom of page 16 the brief of the petitioner states, in regard to the Federal Trade Commission, that:

"Its sole and only function is to inquire whether petitioner has been guilty of unfair competition."

This is not true. One of its functions is to inquire whether petitioner has been guilty of unfair methods of competition. Furthermore, the phrase that he uses begs the question. The Commission must receive evidence in order to obtain the facts of the case upon which it may make its determination as to

whether or not the petitioner was guilty of unfair methods of competition, and no law has ever laid down the doctrine that the Federal Trade Commission may not receive evidence establishing scientific facts. Quite the contrary (See *Sears-Roebuck Case*, 258 Fed. 307; *Royal Baking Powder Company case*, 271 Fed. 744; *Winsted Hosiery case* 42 Sup. Ct. Rep. 384).

Page 17, in the first full paragraph—it is true “that the O. I. C. hog has been recognized as a distinct kind of white hog” but not a breed separate and distinct from the Chester White breed. Sidney D. Frost, one of the witnesses for the petitioner does not know of any authority of any note that says the O. I. C.’s and Chester Whites are different breeds (See R. p. 1880). Not a single author of experience or recognized expert upon swine breeds states they are different breeds. It is true that there is a difference of opinion as to whether the O. I. C. pigs are a different breed from the Chester Whites but Professor Gay and Professor Plumb state that no person of authority says that the two are different breeds. (See R. p. 729). It must be distinctly remembered that the Commission did not decide an issue raised by differences of opinion among experts but it adopted the view of experts instead of the false and fraudulent representations voiced by the petitioner.

On page 21 of the brief for petitioner it is stated when referring to two quotations made on page 20 thereof

“These two quotations are as distinct claims that the O. I. C. is a ‘distinct breed’ as any that have ever been made by the respondent.”

If these two quotations are the best the petitioner can offer he does not prove his case. He simply claims he has improved the Chester Whites.

In the second full paragraph on page 21 of petitioner’s brief there is a quotation from George E. Day’s book “*Productive Swine Husbandry*” (copyrighted in 1913) which quotation the petitioner used

to support his argument that the O. I. C. and Chester White are different breeds. The quotation says that—

“The Ohio Improved Chester White, commonly known as the O. I. C. strain, * * *”

This shows that the author regards the O. I. C. merely as a strain of the Chester White and all of the Government experts on breeds of swine who had occasion to refer to that article so state. In the third full paragraph on page 21 of the brief of petitioner reference is made to the reproduction of that article in 1918 and in the fourth full paragraph it is said that—

“From that time to the present time it has been openly, notoriously and continuously asserted that the O. I. C. hog, or Ohio Improved Chester, is a distinct breed of hog.”

It is to be observed that “from that time” on means from 1916 only. Furthermore, it was only so asserted by L. B. Silver and his mouthpiece, the O. I. C. Swine Breeders’ Association, and as soon as it was so asserted steps were taken by the United States Government in the Federal Post Office investigations in 1916 and 1918 to put a stop to the fraud and in 1919 when the Post Office Department decided to turn the case over to the Federal Trade Commission.

It would be more correct to end up the last paragraph on page 21 of petitioner’s brief with these words—“and each and all of the hogs of L. B. Silver’s ‘herd’ trace back directly into the Chester White records.”

The quotation in the first full paragraph on page 22 of brief for petitioner quoted from the work of Professor Carl W. Gay, published in 1916, shows again that the O. I. C. is called merely a strain of the Chester White and Professor Gay was one of the witnesses for the Commission in this case and testified that the O. I. C. and the Chester White were one and the same breed. The second quotation, therefore, instead of supporting the petitioner’s proposition that the

O. I. C. and Chester White are separate and distinct proves the finding of the Commission that the O. I. C. and Chester White are one and the same breed. In the second full paragraph of brief for petitioner on page 22 it is stated that Sidney Frost, a witness for the petitioner, says that all hogs recorded in the O. I. C. Swine Breeders' Association trace to the L. B. Silver so-called "herd" but it was shown by witnesses for the Commission that all of Silver's "herd" trace back into the Chester White records.

In referring to the third full paragraph on page 22 of the brief for petitioner, which speaks of the book of Professor Gay, the petitioner ought to be fair enough to state that Professor Gay says that all of these swine breeders associations are recorders of Chester Whites. Counsel for the petitioner in this brief did make it appear by the last two paragraphs on page 22 that there are four recording associations whereas there are but three today and the O. I. C. Swine Breeders' Association is one of them. The matter in the part of the paragraph carried on page 23 of brief for petitioner shows the importance of the case and the extent of the influence of the L. B. Silver Company and the O. I. C. Swine Breeders' Association.

In regard to the matter stated in the last full paragraph on page 23 it may be said that absence of suits at common law or in equity proves nothing. This is a proceeding under Section 5 of the Federal Trade Commission Act which covers other and different practices than were comprehended by the common law (See Vol. 20, Columbia Law Review, p. 328). Furthermore, there was no knowledge of petitioner calling the O. I. C. a distinct breed until 1916 at which time the petitioner produced his booklet declaring that the O. I. C. were a distinct breed from the Chester White and were created by mating Chester Whites with what the petitioner calls the Mammoth White, (a breed which was never in existence), and as soon as this declaration was made action was commenced against the petitioner by the Federal Government.

An examination of all the literature of the petitioner and its predecessors in business state that the O. I. C.'s were simply the result of selecting and mating of Chester Whites. The Morgan article (Com. Ex. 15) on Chester Whites is the answer to their 1916 literature.

On page 26 the question immediately above the name John Marcus Evvard and answer thereto do not refer to experts. All the authorities state that the O. I. C. and Chester White are the same. There is no real authority who states there is any difference between them (Hiles, petitioner's witness, R. p. 1821; Silver, president of the petitioner, R. p. 2575, 2830, 2832; Sidney Frost, petitioner's witness, R. p. 1880; Professor Gay, R. p. 729; also Professor Plumb, "the best posted man in America and perhaps in the world on types and breeds of livestock," R. p. 281, Professor Tomhave.)

With reference to the matter appearing on the bottom of page 26 of petitioner's brief it may be said it does not matter what the correct definition of "breed" may be, this court will take judicial notice that there are different breeds of hogs whatever the true definition of the word "breed" may be. Brady v. Shirley, (So. D. 1904) 101 N. W. 886.

On page 28 of petitioner's brief, in the first full paragraph thereof, reference is made to the mistake made by Professor Ewing in his book, but the petitioner is not fair enough to point out in his observation that this difference of opinion once, but not now, in the mind of Professor Ewing was caused by the misleading information contained in the O. I. C. literature, particularly that issued by the L. B. Silver Company, the petitioner and its agent, the O. I. C. Swine Breeders' Association, to distribute propaganda.

The third line of the quotation from Mr. Coburn's book found on page 29 of petitioner's brief "stock found in their locality" shows that Coburn knew or believed that Silver never got any so-called Mammoth White English hogs to originate the so-called

O. I. C.'s as first claimed by the petitioner in 1916. In Coburn's book (Com. Ex. 429) it will be noted that the O. I. C.'s are mentioned as a strain of Chester Whites and that he classifies them as Chester Whites and that whatever he says about the O. I. C. is stated under the heading of the chapter called "Chester Whites" on page 35 of the exhibit. Furthermore, in order to be perfectly fair to the Commission the brief for petitioner ought to have quoted all that Coburn says on pp. 36 and 37 of that exhibit concerning the O. I. C.'s and it will be noted that he calls the O. I. C.'s a strain or family of the Chester Whites.

Practically all of the witnesses mentioned on pp. 29 and 30 are O. I. C. breeders, most of them O. I. C. Swine Breeders' Association stockholders and officials and therefore financially interested in the outcome of this suit. The O. I. C. Swine Breeders' Association mentioned on page 30 in the second full paragraph is really in the position of a respondent before the Commission because it did then assist and is now assisting the petitioner in paying for the legal and other expenses of this case.

In answer to the last full paragraph on page 30 it may be stated that there is not a single premium list that states that prizes will be given to the O. I. C. swine breed as a distinct breed from the Chester White. The secretaries of the American Association of Fairs and Expositions and the International Association of Fairs and Expositions of which all of these fairs are members distinctly testified that the fairs belonging to their associations regard the O. I. C.'s and Chester Whites as the same breed.

A quotation is made on page 31 of the brief for petitioner from *Farm Animals* by Wilcox. This quotation is carried over on page 32, the sixth line of which quotation on page 32 says—

"Within the past few years the Ohio Improved Chester has originated by selection and improvement, based on the Chester White."

This quotation conforms to the statements also made by the petitioner previous to 1916, simply selection and improvement within the breed called Chester White. The petitioner has never before nor since the establishment of the Chester White as a breed introduced any foreign blood and every animal in the O. I. C. records trace back into the Chester White records. Beginning with the fourteenth line from the top of page 33 of the brief for petitioner are these words in quotation from a book by Dr. Lynch, reading as follows:

“No cross was made with any other type, and simply by careful breeding, and common sense weeding out of the undesirable pigs in each litter, he built up a strain of white hogs which were of such an improved nature as to be practically entitled to classification as a separate family.”

This quotation is used by the petitioner in his brief as proof that the O. I. C. is a different breed from the Chester White. The fact is that it states no more than the O. I. C.'s are a strain or family within the Chester White breed. This quotation follows, as others like it follow, the literature found as written by L. B. Silver in the first volume of the O. I. C. record. (Com. Ex. 39 and Res. Ex. 3.)

On page 34 of brief for petitioner a quotation is found at the bottom from Hunt and Burkett's book which shows that the O. I. C. was the result of an attempt to improve the type within the breed. No statement was made that outside blood was used. Another point is that the author states that not only was this done by Silver but by other Ohio breeders. Todd was one of these says Professor Plumb, and Professor Plumb also says that Todd never considered or did he claim that he had a new breed.

With reference to the statement made beginning with the thirteenth line from the bottom on page 37—

“That is a question not of unfair competition, but of the proper definition of words of science and genetics.”

Perhaps considered in the abstract their assertion that the O. I. C.'s are a distinct breed is not, at common law, a question of unfair competition, but when the assertion is made respecting O. I. C.'s sold in competition with Chester Whites to the detriment of the seller of the latter by working a fraud upon the purchaser, it then becomes a question of unfair methods of competition, a question which the Commission has a right to decide. S. D. Frost, whose testimony is made so much of by the petitioner on page 37 at the bottom and who declares he is not an expert on hogs, stated:

“I have no intention of ever qualifying as an expert.” (See R. p. 1943).

A great deal is made by the brief for the petitioner on pp. 42 to 48, inclusive, of the testimony of Professor Davenport. Professor Davenport has made valuable additions to the theory of breeding but as he testified he is rather an experimental breeder of flies, R. p. 2335, and of canary birds, R. p. 2304. He says he is not thoroughly familiar with the different breeds of hogs (R. p. 2305 and 2307-2328). He cannot tell about the different breeds of hogs. Until the night before the trial he had never heard of the famous Poland China breed. R. p. 2329. He states—

“I am not an expert on hogs. (R. p. 2328). My testimony in this matter would be of very little value. (R. p. 2329). I do not know enough about the history of hogs to be of any use in this connection. (R. p. 2335). If there is no difference between the breeds that can be expressed or stated I think it must be regarded as the same breed. If a group of hogs called Chester Whites are compared and no difference can be noted between the Chester Whites and the so-called O. I. C. breed then you could not call them different breeds because the word different implies there is a differential character.” (R. p. 2338 and 2332.)

There is abundant testimony coming from the lips of witnesses on both sides that no difference can be noticed or perceived or stated between the Chester White and the O. I. C. hog.

On page 50 of petitioner's brief the unfair statement is made in the third full paragraph that—

“The different characteristics of the O. I. C. hog and the Chester White are pointed out on pages * * *.”

The unfairness lies in this: The reader would believe that there were differences between the present day Chester White and the present day O. I. C. and that they were being testified about, whereas the differences between the old type Chester White and the modern O. I. C. (Hiles R. p. 1828; Wade R. p. 1961, et seq. also R. pp. 1777, 1850).

At the top of p. 51 of brief for petitioner reference is made to prizes “won by O. I. C. hogs in free for all contests.” First of all they won no prizes in “free for all contests.” The O. I. C.s were shown as Chester Whites and the prizes they won were not prizes in “free for all contests” but were prizes won as Chester Whites in the Chester White class because they were considered as Chester Whites and a reference to Respondent's Exhibit No. 26 shows that S. D. Frost, the O. I. C. breeder, a trustee in the O. I. C. Swine Breeders' Association and the prize winner, advertised these prize winning hogs as Chester Whites. It was stated at the top of p. 51 that there was some “contention at that fair by some of the oldest and largest and most distinguished Chester White breeders that it was unfair to have O. I. C. and Chester White hogs compete in the same class because they were distinct breeds.” The fact was that there were only two who so contended and they were father and son-in-law, each breeding the old type in Pennsylvania of the original Chester White and there is no evidence to show how large or distinguished these breeders were. They were breeders of the old type of Chester Whites and they objected merely to being forced to show with the modern type of Chester White but

their objection was overruled by the fair authorities and they were compelled, and justly so, to show their hogs as Chester Whites and this action, on the part of the managers of that big fair shows that a difference in type within the breed does not evidence difference in breed.

The talk about Large White and Mammoth White on p. 51 so far as the witnesses for the petitioner go is hearsay evidence. The fact is that the Mammoth White is nothing more than a Large White and by Large White is meant Large Yorkshire (See R. p. 1635) and the Large Yorkshire was the Captain Jeffrey's Boar.

Now with reference to the first full paragraph on p. 52 of the brief for the petitioner. Not until some years after 1911 when the article by L. B. Silver concerning O. I. C.s appeared in the Breeder's Gazette was there any mention anywhere made of any crossing by L. B. Silver of Chester White with the Mammoth or Large White. This was an evil conception born of sin in the mind of Carl Silver, his son, who hoped thereby to deceive the public into believing that a new breed was created by such alleged crossing. He could not with safety claim origin of a breed within a breed. To support this evil conception Carl Silver was willing to injure his father's reputation by testifying that his father had told him that all his life he had deceived the public in his articles on the origin of the O. I. C. which had been appearing since 1870, well knowing that the Commission could not bring witnesses to contradict what Carl Silver testified his father told him, for the father was dead.

At the bottom of p. 53 of petitioner's brief counsel admits that we say truly—

“that Silver stated that by careful selection and breeding within the breed he improved the type of the Chester Whites.”

Is it not more reasonable to accept this characterization of the O. I. C.s by their originator, L. B. Silver, namely, that they are nothing more than an improved type of the old Chester Whites than the statement of

his son Carl, the president of the petitioner, who has deceived the public by his representations as to special express rates and by misleading advertisements concerning his offers to sell Chester Whites and concerning the immunity of the O. I. C.'s to hog cholera and other contagious diseases, and who is willing to injure his father's reputation in an attempt to establish his claim that the Chester White and the O. I. C. are different breeds?

Now concerning the statement on p. 57 of the petitioner's brief with reference to Paragraph Six of the findings about recognition of O. I. C.'s by fairs. The petitioner says this finding is untrue. We reiterate that this finding is true and that there is not a single important state, national or international premium list which recognizes the O. I. C. as anything else but a Chester White. It is true that the O. I. C.'s are given in some places *special classification* but this special classification is only given because they are paid to do so by the O. I. C. Swine Breeders' Association who, when it pays this money over to the fairs for the special classification, make the condition that only those O. I. C. breeders belonging to the O. I. C. Swine Breeders' Association shall participate in the special classification, thus showing that it is not doing anything for the O. I. C. breeders as a whole. (See testimony of Carl Warren Gay, formerly the head of the Department of Animal Industry in the University of Minnesota and now head of that department with Professor Plumb of the Ohio State University at pp. 645, 546 and 647.)

The petitioner's brief on this page also says that it is untrue as stated in Paragraph Six that—

“Carl Silver, the president of the respondent, stated that the fairs and expositions throughout the United States are not recognizing the O. I. C. pigs as anything else than Chester Whites.”

The testimony on this point was as follows:

“The fairs and associations were not recognizing us at all as a separate breed. They

were compelling us to exhibit with the Chester Whites * * * We were compelled to show in one class."

(See R. p. 2927.)

The first full paragraph on p. 58 of the petitioner's brief, although reading as follows—

"The Canadian Government does not recognize the Chester White as a separate breed, but recognizes the O. I. C. breed as Chester Whites."

(See Prof. Carmichael and the words he uses—Com. Exs. 221 and 222).

The Canadian Government recognizes the O. I. C. as a Chester White and nothing else and that the O. I. C. Swine Breeders' Association Record is a record recording only Chester Whites. Let us refer to Commission's Exhibit 221. This is Volume 30 of the Canadian Swine Breeders' Record published in 1919. It is to be noticed that on the title page the breeds recognized by the Canadian Swine Breeder's Record are the following: Yorkshire, Berkshire, Chester White, Tamworth, Hampshire, Poland China and Duroc Jersey. No mention is made of O. I. C.s in that list of different breeds on that title page. The same list of hogs is found in the table of contents on the page succeeding the title page. No mention is made there in the table of contents of the O. I. C. as a breed or otherwise. On the second page succeeding the page on which is found the table of contents, we find under the heading of the report of the directors to the Canadian Swine Breeders' Association a list of the different breeds of hogs and no mention is made of the O. I. C.s. The Chester Whites, however, are mentioned in all of these instances as being one of the recognized breeds.

On the page following the page numbered in Roman numerals XXXIV is a page entitled Errata, and there again is found the list of different breeds of hogs among which is mentioned the Chester White while no mention is made of O. I. C. On pages 431 to 516, inclusive, are found the pedigrees of pigs

classified by the Canadian Swine Breeder's Association as Chester Whites. In some instances the pedigrees show the record name or number of O. I. C. Swine Breeders' Association pedigree and again show the pedigree number of the Canadian Swine Breeder's Association Record. This indicates the record in which the hogs or their ancestors were recorded, namely, the O. I. C. Swine Breeders' Association, which is conclusive proof that the Canadians recognize the O. I. C. Swine Breeders' Association Record as recording nothing more than the Chester Whites, in other words, as a Chester White Association Record. Two instances are found in the fifth and sixth pedigrees from the bottom of p. 514 of Volume 30 of the Canadian Swine Breeder's Record. Another instance of this is found on p. 516 of this Volume 30, Canadian Swine Breeder's Record, in the fourth pedigree from the top of said page. In the latter part of the Volume is found the indexes to the animals of the different breeds. The index to the Chester White animals is given but no index is given to the O. I. C.s and in the index to the Chester Whites are found animals found in the O. I. C. Swine Breeders' Association Record.

As to the matter on the bottom of p. 59. The evidence on this point is conflicting. The truth lies either with Carl Silver or with Herbert A. Jones. Jones testified that as secretary of the International Record Association that he did not accept papers for the hogs Silver sent in as they had paper ancestors of hogs that never existed.

The admission is made on p. 60 of petitioner's brief—

“that from time to time respondent (petitioner) has bought numbers of famous pure bred Chester White boars, re-registered them in the O. I. C. Swine Breeders Record, mated them of and as pure bred O. I. C. pigs.”

That is the truth. If a hog that Silver bought whose ancestors were recorded in a Chester White Record was 100% in blood lines a Chester White then they

and their offspring when mated to hogs in Silver's so-called herd were 100% Chester White, just as every hog registered in any of the Chester White records was 100% Chester White. A hog must be 100% of that breed to be eligible for record in any reliable Chester White record. The action on the part of Silver then in taking Chester White boars and mating them to O. I. C.s is an admission by him that the Chester White and the O. I. C. are the same breed or else he is admitting that he is working a fraud on the public by selling to it as pure bred hogs, hogs which are the result of crossing of different breeds, and hence cross breds.

In reply to the statement in the second full paragraph on p. 60 of petitioner's brief we again state that it is true that the score card for the O. I. C. has been since the earliest day the same as the Chester White. The evidence submitted by O. C. Vernon in this case as secretary of the O. I. C. Swine Breeders' Association was to the effect that the official score card of the O. I. C. is found in Volume A of the International O. I. C. Swine Breeders' Association Record. This score card is a copy of the score card found in the volumes of the National Chester White Record and due credit was given in Volume A to the members of the National Chester White Record for said copy. Volume A is Commission's Exhibit 501. The same is Commission's Exhibit 229.

This credit, given to the National Chester White Record Association, was given in said Volume A by H. A. Jones, a witness for the Commission, the secretary of the International Swine Breeders' Association, on those pages following the score card and the remarks. It should be noted, however, that where Mr. Jones refers to the fact that some parts of this were taken from the National Chester White Record that it was the score card which was taken, that the remarks following the score card were not taken from the National Chester White Record and since they were not, Jones truthfully stated as he did state in this Volume A, that due credit was given

for those parts that were taken from the National Chester White Record.

In referring to the matter stated on p. 65 of petitioner's brief at the top of that page petitioner says that after the first day of December 1918 it has voluntarily and permanently discontinued all advertisements or representations by any means whatsoever to the effect that it did sell Chester Whites at a price less than that at which it did sell O. I. C. hogs or at any price whatsoever. This cessation took place, it will be noted, at the time the Post Office Department began proceedings against the petitioner for fraudulent use of the mails and this was one of the fraudulent acts charged and it was only fear of prosecution that put a stop to petitioner's fraudulent practice.

The fact that the petitioner admits that it did the false and fraudulent thing and that it asserts no right in continuing to do so is no reason why an order should not issue against it. The same argument was presented in the *Sears Roebuck Company v. Federal Trade Commission* case, 258 Fed. at 310, but the court nevertheless sustained the Commission's order.

Now in answer to the matter appearing on pp. 74, 75, 76, 77, 78, 79, etc., in regard to hog cholera. On p. 79 the petitioner admits that there were outbreaks of hog cholera on four different farms in the petitioner's locality from January, 1920, down to and including the time of the hearings, May, 1920. This is one a month. Isn't it remarkable that for over fifty-three years no outbreak of any contagious animal disease occurred in that locality until a complaint was filed and that that fact brought about the remarkable result of producing outbreaks of hog cholera alone on four different farms within a period of six months? *Mirabile Dictu!*

The petitioner's brief on p. 79 says that Carl Silver testified—

“We haven't sent out any printed matter saying there was no cholera in the locality since the cholera on the McKeefry farm.”

Well, hog cholera occurred on the Trotter farm on January 22, 1920. Carl Silver, the president of the petitioner, sent to the Federal Trade Commission printed matter in two envelopes, one postmarked May 19, 1920 and the other June 1, 1920, each having on the outside in red type the following matter:—

“No cholera, foot and mouth, or any other contagious diseases in our locality for over 50 years.” (Com. Ex. 8.)

This shows that for five months at least after the outbreak of cholera on the McKeefry farm the petitioner was still sending printed matter through the mail stating that there had been no hog cholera, foot and mouth, or other contagious diseases in that locality for over fifty years.

THE LAW.

I. SINCE THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THESE FINDINGS THEY ARE CONCLUSIVE UPON THE COURTS.

Section 5 of the Federal Trade Commission Act declares that the findings of the Commission as to the facts if supported by the testimony shall be conclusive. *Federal Trade Commission v. Winsted Hosiery Co.*, 42 Sup. Ct. Rep. 384, 385.

In the *National Harness Mfrs. Assn.* case this court said concerning the Federal Trade Commission Act: “The statute further provides that the findings of facts by the Commission shall be conclusive, if supported by the evidence. It follows there will be no occasion to resort to the record on which the findings were based, unless it is alleged that there was no evidence to support a particular finding, and then it would be necessary to examine only so much of the evidence as pertained to that subject.” *Nat’l Harness Mfrs. Assn. v. Federal Tr. Commission*, 261 Fed. 170, 171.

II. IT IS THE FUNCTION OF THE COMMISSION TO DETERMINE WHETHER THE PETITIONER USED UNFAIR METHODS OF COMPETITION IN INTERSTATE COMMERCE. THEREFORE, IT WAS NECESSARY FOR THE COMMISSION TO DECIDE WHETHER THE REPRESENTATIONS OF THE PETITIONER WERE TRUE OR FALSE. HENCE IT HAD JURISDICTION TO MAKE THE FINDINGS IT DID.

The point is made in the petitioner's brief that the Federal Trade Commission was not instituted, nor has it the power or jurisdiction to determine the meaning of the words or a fact of science, and, therefore, it had no jurisdiction to inquire whether, and upon substantial evidence to find that, the O. I. C. hogs were nothing more than Chester Whites. This argument is not sound.

The Commission does have the right to determine whether the petitioner has used unfair methods of competition in interstate commerce. In determining this matter it has jurisdiction to inquire whether the petitioner is making false and untrue representations as to the nature and quality of what he sells. The basis of proceedings under the Federal Trade Commission Act in cases like this is the deception of the public. *Royal Baking Powder Co. v. Federal Trade Commission*, 12 Trade Mark Reporter, 140, at 152, 281 Fed. 744. It was, therefore, its duty, and so its right, to decide, whether the petitioner was stating the truth when it represented to the public that the O. I. C. hogs were a separate and distinct breed of hogs from the Chester Whites, and the other questions of fact in this proceeding.

In his oral argument at the hearing before the Commission, and in his brief in support thereof, this same counsel, now representing the petitioner here, stated then as now that the Commission has no jurisdiction to determine the meaning of words, and in support thereof relied upon the decision of

the Winsted Hosiery case made by the Second Circuit and found in 272 Fed. 957. But that decision was later overruled in the spring of 1922 by the Supreme Court. 42 Sup. Ct. Rep. 384.

In that case the Supreme Court held that in order to determine whether the respondent there was guilty of unfair methods of competition the Commission had jurisdiction to inquire whether the respondent was correctly representing to the public the nature of its goods by the names it gave to them. The Commission had found that these names did not correctly represent to the public the nature of the respondent's goods, and that the public were thereby misled. And the Supreme Court held that the Commission had the right to make inquiry and to find whether the respondent by its labels correctly set out the nature of its goods and that the finding was conclusive upon the courts.

So too in the Royal Baking Powder case, 12 T. M. Rep. 140, 281 Fed. 744, the petitioner in that case contended that misrepresentation of the nature of one's own goods is not an unfair method of competition within the meaning of the Federal Trade Commission Act. Said the Court: "Counsel for the petitioner argues that no statute or decided case has declared that a manufacturer or dealer owes to his competitors the duty of refraining from misrepresentation of the quality or ingredients of his own goods, and that on the contrary it has been firmly held that no such duty exists. * * * The answer to the contention of the counsel for petitioner is found in a recent decision of the Supreme Court which has not yet been published," (referring to the Winsted Hosiery case), * * * "And it is now made plain that the statute has invested the Commission with jurisdiction to order any one who misrepresents the quality of his goods in his advertising to cease and desist from such unfair methods of competition."

Other departments of the Government determine so-called scientific facts in order to decide questions

within their authority, for instance, the Land Department, The Department of Agriculture, and the Courts.

The facts which may be conclusively passed upon by the Land Office are such as pertain to the character of the land. Thus the courts will accept as conclusive a decision of the Land Office on a question of the actual physical character of certain lands. *Heath v. Wallace*, 138 U. S. 573; as, whether or not such lands are "swamp and overflowed." *Heath v. Wallace*, 138 U. S. 573; *Crane, etc. Co. v. Club Co.*, 46 Fed. 273; or whether or not the lands are "unfit for cultivation" within the meaning of an Act of Congress, *U. S. v. Budd*, 144 U. S. 154, *Pengra v. Munz*, 29 Fed. 830; or whether or not the lands were designated mineral lands. *Bueno Vista Petroleum Co. v. Min. Co.*, 67 Fed. 226; *Stockley v. U. S.* 271, Fed. (5th C. C. A.) 632, 640, or whether the lands were included within a grant to a railroad company, *Colburn v. Railroad Co.* 13 Mont. 476, *Moore v. Railroad Co.* 45 Pac. 215; or whether the claimant has complied with a statute, *U. S. v. King*, 9 Mont. 75; or whether a homestead entry had been cancelled before a railroad company filed its map, claiming the land in question under its grant. *Howell v. Killie*, 17 Colo. 88; or whether the land was of such a character as to allow of a homestead entry, *Johnson v. Lumbering Co.* 24 Oregon, 182; or whether the land was valuable for placer mining or valuable only for agriculture. *Kirk v. Olson*, 245 U. S. 225.

The Department of Agriculture may, under the Pure Foods and Drug Act, by its control over labels prevent the sale of food under any false or deceptive name. The Supreme Court has held that: "Whether or not the term 'Sausage,' when applied to the product of the appellee, in which more than the permitted amount of cereal and water is used, is false and deceptive is a question of fact, the determination of which is committed to the decision of the Secretary of Agriculture by the authority given him to make rules and regulations for giving effect to the Act, and

the law is that the conclusion of an executive department on such a question will not be reviewed by the courts, when it is fairly arrived at with substantial evidence to support it." *Houston v. St. Louis Packing Co.* 249 U. S. 479, 484.

In *U. S. v. Antikamnia Co.*, 231 U. S. 654, the statement was made on the label of each package of "Antikamnia Tablets" that the defendant offered for sale that it contained acetphenetidin but no acetanilid. The Department of Agriculture under the Pure Food and Drug Act confiscated and condemned the packages on the ground that their labels were false and misleading. The Supreme Court recognized the right of the Secretary of Agriculture to decide that acetphenetidin was a derivative of acetanilid and to draw the conclusion that the label was false and misleading.

In the matter of the case of the Commissioners of the Almshouse vs. Alexander Whistelo (black man)—a bastardy case, 3 Wheeler's Criminal Reports, 194, the question presented before the court was whether the defendant negro was the father of a certain child. The case involved a most important question in physiology, and the most respectable medical men in New York City were called in to give their opinions. The president of the medical society, several professors and other distinguished physicians testified that the child could not be the offspring of the mother and the defendant and the court decided that the application to charge the defendant as the father of the illegitimate child should be overruled and that he be discharged from his recognizance.

This case is a direct authority for the proposition that the court may, upon testimony of experts, determine a question of science.

Under the Federal Pure Food and Drug Act, 34 St. at L. 768, C 3915, provision is made for the seizure and destruction of adulterated or misbranded articles of goods transported in interstate commerce for sale.

Under this act the court has the right to consider and to decide the cases upon the facts of science

established by the testimony of experts in chemistry. U. S. v. Six Barrels of Ground Pepper, 253 Fed. 199.

It has been held by the Supreme Court that a trial court has the right to determine, under a charge of fraud and violation of the Federal Criminal Code, whether land offered for sale and purchased was of the nature which the seller claimed it to be. U. S. v. New South Farm, 241 U. S. 64.

It was held in *Brady v. Shirley*, (So. Dak. 1904), 101 N. W. 886, that the court had a right to determine to what breed of horses a colt belongs and base its finding upon the opinion of non expert witnesses who were familiar with the breeds of the horses in question.

In cases in the courts it has been decided as a matter of fact to what breed an animal belongs. Thus in *Citizens Rapid Transit Co. v. Dew* (Tenn. 1898) 40 L. R. A. 518, the Supreme Court of Tennessee upheld the right of the trial court to inquire into and to determine the breed to which a dog belonged. The notes are full of many other cases. So the Ohio Supreme Court has decided that the trial court may properly determine to what breed a mare belongs. *Pittsburgh, etc. Ry. Co. v. Sheppard*, (1897), 56 Ohio State 68.

III. THE PETITIONER USED UNFAIR METHODS OF COMPETITION IN VIOLATION OF SECTION 5.

- (A) "UNFAIR METHODS OF COMPETITION" IS A MORE INCLUSIVE PHRASE THAN THE COMMON LAW PHRASE "UNFAIR COMPETITION."

It is not exactly understood to what counsel for the petitioner refers on pages 9 to 16 inclusive in his brief. If, by the matter stated on those pages, counsel for the petitioner takes the position that the term in the Federal Trade Commission Act, "unfair methods of competition" embraces no other class of

cases than what, at common law, the term unfair competition included, he is mistaken. This was the position unsuccessfully taken by counsel for the petitioner in the *Royal Baking Powder Company v. Federal Trade Commission*, 12 Trade Mark Reporter, 140, 149, 281 Fed. 744. The Circuit Court disposed of that argument in the following language:

"In the *American Washboard Company Case* the complainant was the manufacturer of a washboard having the rubbing face made of aluminum and upon which it used the word "Aluminum" as a trade name. It was the only manufacturer of such boards in the country, having secured a monopoly of all the sheet aluminum produced which was suitable for use in their manufacture. The bill which asked for an injunction alleged that the defendant had placed on the market a washboard on which it used the word "Aluminum" by reason of which the public was deceived into buying it as a genuine aluminum washboard, although there was none of that metal in its composition. The Circuit Court of Appeals for the Sixth Circuit, then composed of Judges Taft, Lurton and Day, each of whom later became a member of the Supreme Court, held that the facts alleged did not entitle the complainant to relief, since it was not shown that purchasers bought defendant's boards in the belief that they were made by complainant. In the course of the opinion, which was written by Judge Day, he said:

" 'Can it be that a dealer who should make such articles only of pure wool could invoke the equitable jurisdiction of the courts to suppress the trade and business of all persons whose goods may deceive the public? We find no such authority in the books, and are clear in the opinion that, if the doctrine is to be thus extended, and all persons compelled to deal solely in goods which are exactly what

they are represented to be, the remedy must come from the legislature, and not from the courts.'

"The above case illustrates the reason which led Congress to enact the Statute creating the Federal Trade Commission and making unfair methods of competition unlawful and empowering the Commission to put an end to them. By that Statute the identical situation which the court in the above case said it was beyond its power to suppress has been brought within the jurisdiction of the Federal Trade Commission—created to redress unfair methods of competition. Before the enactment of the Federal Trade Commission Act the courts appear to have had jurisdiction of an action for unfair competition only when a property right of the complainant had been invaded. But the Federal Trade Commission Act gave authority to the Commission itself when it had reason to believe that any person, partnership, or corporation was using any unfair method of competition in commerce, if it appeared to it that a proceeding by it in respect thereof 'would be to the interest of the public' to bring such offending party before it to answer to its complaint and after a hearing could, upon good cause shown, require it to cease and desist from its unlawful methods.

"The answer to the contention of the counsel for the petitioner is found in a recent decision of the Supreme Court, which has not yet been published. In *Winsted Hosiery Company v. Federal Trade Commission* 272 Fed. 957, this court had before it the method of an underwear manufacturing company of branding its products as wool, merino, etc., when in fact they were composed only partly of wool or merino. A great deal of testimony had been taken which this court thought fully established that the trade was not misled in

any respect by the label complained of. But some witnesses testified that in their opinion some part of the consuming public was or might be misled into thinking the underwear so described was pure wool. It also appeared that the method of branding which this manufacturer pursued was in accord with the general custom and practice of the underwear trade throughout the United States and was well known to and recognized by the distributors of underwear in this country. We therefore held that the order of the Federal Trade Commission requiring the particular manufacturer to desist from such methods was error and did not constitute unfair competition. The reversal of the case by the Supreme Court has established the principle that advertisements which are false in fact constitute an unfair method of competition although it was one commonly practiced and not intended to mislead the trade. The labeling of commodities in such a way as to deceive the public in an unfair method of competition. The manufacturer must not brand his goods as 'wool' when they are part wool and part cotton. And it is now made plain that the Statute has invested the Commission with jurisdiction to order anyone who misrepresents the quality of his goods in his advertising to cease and desist from such unfair methods of competition.

"In the case now before the court the Commission was convinced and its opinion was justified by the evidence that the petitioner in the use of its labels, and otherwise, was employing false and misleading advertising which was calculated and designed to deceive the public and which did deceive the public into buying a phosphate baking powder believing that it was the Dr. Price's Baking Powder which had been well known for 60 years as a cream of tartar powder, concealing and ob-

scuring the fact that it was a radically different powder. The case is plainly governed by the principle laid down in the Winsted Hosiery Company case." See also 20 Columbia Law Review, 328.

- (b) MISLEADING THE PUBLIC BY FALSE STATEMENTS ABOUT ONE'S OWN GOODS IS AN UNFAIR METHOD OF COMPETITION, EVEN THOUGH TRADE IS NOT MISLED.

There is still another matter which may be brought to the attention of this court. In his oral argument in this case before the Commission and in his brief submitted to it, this same counsel now appearing here for the petitioner contended that if *the trade* was not misled by the representation that the O. I. C. is a separate and distinct breed from the Chester Whites there can be no unfair competition affecting the general public, and in support of his contention he cited and relied upon the decision in the Winsted Hosiery case made by the Circuit Court of Appeals, Second Circuit, reported in 272 Fed. 957.

But in the Royal Baking Powder case, 12 Trade Mark Reporter 140 at 151, 281 Fed. 744, this Second Circuit Court declared that "the reversal of the case by the Supreme Court has established the principle that advertisements which are false in fact, constitute an unfair method of competition, although it was one commonly practised and not one intended to mislead the trade." The labeling of commodities in such a way as to deceive the public is an unfair method of competition.

The law therefore is, under the Federal Trade Commission Act, that a seller must not brand, or label, or name his goods in such a way as to lead *the public* to believe that they are of a nature different from what they are. And the act has invested the Commission with jurisdiction to order any one who misrepresents the quality of his goods in his advertising, to cease and desist from such unfair methods of competition.

(c) TO FALSELY STATE THAT ONE'S GOODS ARE DIFFERENT FROM COMPETITORS' GOODS IS UNFAIR.

There is a third matter to which the attention of this court is respectfully invited. In his brief the petitioner at page 15, first full paragraph, declares, that "in all this vast volume of law no case can be found in which it has been said to be unfair competition or fraudulent for one man in selling his goods to say, 'my goods are fundamentally different from the goods of my competitors.'" The argument is that since the petitioner made no attempts to pass off his goods as those of his competitors he is not guilty of unfair competition. That argument is not legally sound.

It is true that so many of the cases of unfair competition consist of passing off cases that the general statement is made that unfair competition consists in passing off one's own goods as those made by another. That class of cases does not include, however, *all* cases arising under the classification of unfair methods of competition. Fraud is the basis of unfair competition. And unfair competition may consist of claiming falsely that one's own goods are different from those made by another.

In a recent case, decided by the United States Supreme Court, the facts were that the petitioner and the respondent were both "competitors in the gathering and dissemination of news," and that the petitioner took the respondent's news and sold them as its own, and the bill was filed to restrain the pirating of respondent's news by the petitioner. The court held that the practice of the petitioner was unfair competition and that the bill should be sustained. *International News Service v. Associated Press*, 248 U. S. 215.

In the course of the opinion, the court, at page 241, said:

"It is said that the elements of unfair competition are lacking, because there is no attempt by the defendant to palm off its goods

as those of the complainant, characteristic of the most familiar, if not the most typical cases of unfair competition. *Howe Scale Company vs. Wycoff, Seamans & Benedict*, 198 U. S. 118 to 140. But we cannot concede the right to equitable relief is confined to that class of cases. In the present case the fraud upon complainant's right is more direct and obvious. Regarding news matter as the mere material from which these two competing parties are endeavoring to make money, and treating it, therefore, as quasi property for the purpose of their business, because they are both selling it as such, defendant's conduct differs from the ordinary case of unfair competition in trade principally in this—that instead of selling its own goods as those of complainant, it substitutes misappropriation in the place of misrepresentation, and sells complainant's goods as its own."

So too in *Sears, Roebuck & Company vs. Federal Trade Commission*, 258 Fed. (C. C. A.) 307, "the Commission had entered an order commanding a mail order house to desist from circulating catalogues" in which it represented to the public that its teas and coffees were different from the teas and coffees obtained and sold by its competitors when in fact its teas and coffees were the same in quality and kind. Such advertisements tended to injure competitors and to deceive purchasers.

Now, while the L. B. Silver Company is not selling other people's goods as its own, it is selling the same class of goods that others are selling, Chester Whites, and under the name O. I. C. is representing them to be different from what they really are. This is a fraud upon the people, and just as much a fraud as may be found in the Supreme Court case cited above.

The U. S. C. C. A. for the Second Circuit, in *Royal Baking Powder Company, vs. F. T. Com.* 281 Fed. 744, held that the misrepresentation to the general public of the nature of goods of its own manufacture

is unfair competition. In that case the Royal Baking Powder Company's representations to the public were such as were calculated to deceive and did deceive the public into believing that a baking powder of its manufacture was different in its nature from what it really was. The court affirmed the doctrine that a manufacturer or trader owes to his competitors the duty of refraining from misrepresentation to the public of the quality of ingredients of his own goods.

This is the doctrine laid down by the U. S. Supreme Court in *Winsted Hosiery Co. v. Federal Trade Commission*, 42 Sup. Ct. Rep. 384, overruling the decision by this Circuit Court in 272 Fed. Rep. 957. The principle is that advertisements which are false in fact constitute an unfair method of competition although it was one commonly practiced, and not intended to mislead *the trade*, and did not mislead *the trade*.

The Supreme Court, 42 Sup. Ct. 384, overruled the opinion of the Circuit Court of Appeals announced in the *Winsted Hosiery Company Case*, decided in 272 Fed. Rep. 957, 961. It said: "When misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods." Such misbranding is unfair competition as respects those manufacturers who are honest, and as against the public generally. Furthermore, the misbranding manufacturer is a wrongdoer because he furnishes another with the means of consummating a fraud. So also trade-marks which deceive the public are denied protection although members of the trade are not misled thereby."

The Supreme Court in the *Gratz case* 253 U. S. 421, and more recently in the *Federal Trade Commission vs. Beech Nut Packing Co.*, 42 Sup. Ct. Rep. 150, declared in the course of its opinion, that the words "unfair methods of competition", in the Federal Trade Commission Act, are applicable to (1) practices which heretofore were regarded as opposed to good morals, because characterized by

deception, bad faith, or oppression, (2) practices against public policy because of their dangerous tendency unduly to hinder competition, or (3) create a monopoly. In both these cases and in *Winsted Hosiery Co. v. Federal Trade Commission*, 42 Sup. Ct. Rep. 384, this court holds that the language of the trade commission act is sufficiently inclusive to reach all acts or practices which have the prohibited effect of unduly hindering or suppressing competition.

(D) APPLICATION OF FOREGOING PRINCIPLES TO PETITIONER'S METHODS.

Applying the principles of the foregoing cases to the facts of the instant case it is clear that: The false claims made by the petitioner, of the alleged breed difference of the O. I. C.'s from the Chester Whites, their non-liability to cholera, tuberculosis, foot and mouth and other contagious diseases, total absence of the presence of such diseases in its locality—thirty by twenty miles—for over 50 years, special discriminatory express rates not enjoyed by other live-stock shippers, capacity for immense size, etc., are unfair methods of competition.

Based upon the false claim of the petitioner that the O. I. C. hogs are a breed separate and distinct from the Chester Whites, the petitioner for years has, in competition with other hog breeders, and particularly with breeders of Chester Whites, been soliciting orders for O. I. C. hogs throughout the United States and foreign countries.

An instance of the use made by the petitioner of its claim that the O. I. C.'s are a breed separate and distinct from the Chester Whites is shown in a series of exhibits, consisting of letters, in which the petitioner offers O. I. C. hogs at \$45 per pair and Chester White hogs at \$20 per pair, saying: "These are not the O. I. C.'s by any means, but the same as the Chester Whites sold in Pennsylvania and elsewhere." Com. Ex. No. 507, or as in Com. Ex. No. 508, "While

we guarantee these as good as are sold by any breeder, yet these are not the O. I. C.'s by any means." See also Com. Ex. Nos. 509, 510, 511, 512, 513, 514, 515, 517, 516, 518, 531, 532, 533, 534, 535, 536. The comparison thus made is published to prospective purchasers for the very purpose of discrediting breeders of Chester Whites by falsely misleading the public into believing that the O. I. C. hogs are a breed separate and distinct from the Chester Whites and that this falsely alleged difference indicates a superiority of the O. I. C.'s over the Chester Whites.

Another thing in illustration of this fraudulent practice. The petitioner bases upon its false claims that the O. I. C.'s are a breed separate and distinct from the Chester Whites, a further false claim that any similarity of the Chester White hog to the O. I. C. hog is the result of improvement in Chester White quality and characteristics brought about by mating the O. I. C. hogs to Chester Whites to the great betterment of the latter, whereas the fact is that the petitioner has itself used registered prize winning Chester Whites from time to time to improve the so-called O. I. C. hogs, and has sold the progeny of these matings to the public as pure bred O. I. C. hogs. If the Chester Whites and the O. I. C.'s are really different breeds then these progeny of these matings could not honestly and truthfully be sold to the public as pure bred O. I. C. hogs for the progeny of parentage of different breed are grade hogs.

A third example of the use of the false claim of alleged breed difference is this: The petitioner for years past has been and is now publishing literature, Com. Ex. No. 503 D., in which an illustration of an old type Chester White sow, named Belle of Chester 3d, (farrowed January 18, 1879, see Silver's testimony p. 2624-2625 and Com. Ex. No. 502, at page 162, and National Chester White Record, Volume 1, page 257), was by way of contrast placed above an illustration of a modern so-called O. I. C., named Jackson Chief, farrowed about 22 years afterwards, namely May 10, 1901, (See Volume 4, O. I. C. Record, No.

4759), for the very purpose of convincing the purchasing public that the O. I. C. is a breed far different in type and much superior to the Chester Whites. The fact is that progeny of Belle of Chester 3d was used by L. B. Silver to improve the type of his so-called O. I. C.'s., (pages 2624-2625 testimony of Carl Silver), and that Jackson Chief the so-called prize winning O. I. C. was advertised and exhibited by its breeder as a Chester White and that its pedigree traces back directly into Chester White Records.

These practices show if the public purchases the so-called O. I. C. hogs because induced to do so by the false representations that these hogs are a breed different from or superior to Chester White hogs, then the O. I. C. hogs are in unfair competition with Chester White hogs and the petitioner thereby discredits its competitors, the breeders of Chester Whites, and they are not only unfair to the competitors of the petitioner but they are unfair to all of those of the public purchasing O. I. C. hogs under the belief they are a different breed from the Chester Whites, because, when the O. I. C.'s are offered by these purchasers, either in the market for the purposes of slaughter, (see testimony of Walton and McCann), or are exhibited by them for show purposes at the fairs, swine shows and exhibitions, they are met with the statement that their O. I. C. hogs are no other breed than Chester White.

Another way in which the false claims that the O. I. C. hogs are separate and distinct from the Chester Whites is used to coax trade away from its competitors, (and this applies to vendors of all hogs), is the false and misleading advertisements concerning the alleged non-liability of the O. I. C. hogs to contract hog cholera, foot and mouth, tuberculosis and other contagious diseases, and the representation that there have been no such diseases in the petitioner's locality for the past 50 or 53 years.

The experts in swine diseases who are employed by the Federal Government and by the State of Ohio are clear in their testimony that these claims concern-

ing the alleged freedom from, and the alleged non-liability of O. I. C. hogs to, these diseases, are false and misleading. And the experts of the United States Government declare that such false statements interfere with the endeavors of the Federal and State Governments to stamp out these very destructive diseases.

When purchasers of O. I. C. hogs are assured that these animals are less susceptible to hog cholera and other contagious diseases than hogs of other breeds, they will rely upon such statements as being true. As a result, a double injury occurs; *first*, to the purchaser of the hogs who may lose his animals, as O. I. C. hogs are just as susceptible to hog cholera as any other hogs, and the owner of O. I. C. hogs relying upon the false statements of O. I. C. immunity of such diseases will not exercise the precaution which these experts are continually declaring must be taken by the owners of all breeds of hogs; *second*, because of the outbreak among his herd, a new center of disease is established in the community, which will result in heavy losses to other hog owners in the community.

Such statements are unfair to breeders of other hogs because it causes people to buy O. I. C.'s rather than other hogs. (Stone 764-766 of the Record). The effect on the general public of such statements is to persuade those who are not posted on matters of this sort, to buy O. I. C.'s and they hinder the man who is trying to sell his hogs on their real merits and cannot therefore honestly make such representations. (See pages 1573-1578 of the Record).

So that when the public purchases O. I. C. hogs in the belief that the O. I. C. hogs possess, as falsely claimed by the petitioner, non-liability to cholera, tuberculosis, foot and mouth and other contagious diseases, the O. I. C. hogs are in unfair competition with all other hogs as to immunity to such diseases, because the O. I. C.'s do not possess a resistance or non-liability to contagious disease not enjoyed by other hogs.

A word now about the petitioner's false claim of special express rates given by express companies to its shipments of its O. I. C. hogs and not given by them to shippers of other hogs. The petitioner has advertised for a long period that "owing to our extensive shipping of live stock the express companies have agreed to give stock shipped by us special rates." See Commission's Exhibit No. 504.

The notations on such circulars are absolutely without authority so far as any express company is concerned. Shipments of hogs by express are, and were at the time such circulars were issued, charged under the Official Express Classification, first class rates when crated, and no exceptions were made from Cleveland or any other point. All shippers of stock on all the Express Companies' lines have the same relative rates, and there is no discrimination whatever against any particular point, and in favor of any other point. All shippers at that time, and ever since have, paid the regular first class rate prescribed by the Interstate Commerce Commission.

No such statement as that made by petitioner could be further from the truth, for, the Commission and this Court may take judicial notice that the *Act to Regulate Commerce* was created for the purpose of removing all such discrimination and granting the same rates to all shippers alike.

The rates applied by all the Express Companies on shipments of live stock forwarded by the L. B. Silver Co., were the same as the express companies would apply on any other shipment of live stock out of the petitioner's shipping points, and no preferential rates were granted to anybody by the express companies.

No doubt many people have purchased swine from the petitioner rather than from its competitors in reliance upon the so-called special express rates falsely claimed and offered to its patrons.

If the public purchases O. I. C. hogs because though only partly induced to do so by the false statement of the petitioner that "owing to our extensive shipping of live stock the express company has agreed to give

stock shipped by us special rates," the O. I. C. hogs are in unfair competition with all other hogs because the O. I. C. hogs cannot by law receive more favorable express rates than are given to other breeds of hogs.

So too if the public purchases O. I. C. hogs because induced to do so by the false claim made by the petitioner "that two of our O. I. C. hogs weigh 2806 lbs. Will ship you sample pair of these famous hogs on time and give agency to the first applicant," the O. I. C. hogs are in unfair competition with all other breeds of hogs because such false statement creates the impression that hogs sold by the petitioner are from animals of great size, which is not the fact.

The above observations on the false claims of the petitioner show that there is an unfair method of competition by the petitioner with breeders of Chester Whites and other hogs. The Winsted Hosiery Company case, 42 Sup. Ct. Rep. 384, The Sears-Roebuck & Co. case, 258 Fed. 307, and the Royal Baking Powder Co. case, 12 Trademark Rep. 140, 281 Fed. 744, all recognize that the Federal Trade Commission has jurisdiction over cases of such unfair practices.

Nearly all this unfairness to its competitors proceeds from and arises out of the claim of the petitioner as to difference of breed between the O. I. C. and the Chester White, a claim which is a continuing menace to its competitors and to the public in general.

There is no telling to what other unfair methods of competition the petitioner will put its false claim that the O. I. C. are different from the Chester White if the practice is not stopped. It will be limited only by the ingenuity of those who control it.

The act of the petitioner amounts to an interference with the normal course of trade by diverting from Chester White and other breeders that which would go to them were it not for the false claims made by the petitioner with respect to the kind and quality of its goods. This is unfair competition. *Coca-Cola Co. vs. Old Dominion Beverage Co.*, 271

Fed. Rep. 600; *International News Service vs. Associated Press*, 248 U. S. 215.

In *Missouri Drug Co. vs. Wyman*, 129 Fed. 621, the vendor, in order to sell some of its goods, made extravagant statements which rested upon no substantial basis of fact or experience. The court held that it was obtaining money by means of false and fraudulent pretenses and representations and issued a judgment against it.

IV. PETITIONER CANNOT JUSTIFY HIS STATEMENTS BY CHARACTERIZING THEM AS EXPRESSIONS OF OPINION OR AS MERE PUFFING.

It is unfair to state as a fact an opinion contrary to facts. If a man, having a genuine opinion on any matter chooses, nevertheless, to state it as a fact, or having information, expresses the subject of it, in Beatrice's phrase, "Better than reportingly," he must take all the risks, and abide by all the consequences, attending a representation pure and simple.

Again a man who states, in the form of a statement of fact, what is his opinion on a matter, when at the time of making the statement it was in his power to find out the real facts, and he knew his opinion had not been verified, is guilty of fraudulent intent and an action for deceit will lie. *Chatham Furnace Company v. Lawrence Moffatt*, 147 Mass. 403, citing *Cooper v. Schlesinger*, 111 U. S. 148. See also *Missouri Drug Co. v. Wyman*, 129 Fed. 623, 628.

"It is said that the owner has the right to give his views regarding the effect of his drugs. But state of mind is itself a fact, and may be a material fact, and false and fraudulent representations may be made about it; and persons who make or deal in substances, or compositions, alleged to be curative, are in a position to have superior knowledge and may be held to good faith in their statements." *Seven Cases v. U. S.* 239 U. S. 510, 517. See especially 518.

It is no defense that the defendant honestly believed or supposed that the statement was true, *Schlechter v. Felton*, 158 N. W. 813; *Johnson v. Cate*, (1902), 75 Vt. 100; even though the belief is based upon reasonable grounds, *Cole v. Cassidy*, (1885) 138 Mass. 437; or even though due diligence has been used to ascertain the truth, *Huntress v. Blodgett*, (1910), 206 Mass. 318; or that he has so been informed by others, *Fisher v. Mellin*, 103 Mass. 503; In some states the statute declares that the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true, is actual fraud. Statutes to this effect are in force in Montana, South Dakota and Oklahoma.

"It is not always true that a misrepresentation to amount to a fraud must be a misrepresentation as respects some matter of fact, although such is the general rule. There are well established exceptions to this rule. An opinion may be expressed under such circumstances as will render a person guilty of a fraud; as, where one who is an expert, or who possesses peculiar knowledge of the value of the quality of an article expresses to another, who lacks such special knowledge, and who relies upon the superior information of the person with whom he is dealing, an opinion as to the value or quality of the article which he does not honestly entertain, doing so for the purpose of deceiving him." *Missouri Drug. Co. v. Wyman*, 129 Fed. 623, 628.

In view of the testimony and the documentary evidence distributed by the petitioner and The O. I. C. Swine Breeders' Association to further the business of the petitioner it can hardly be argued that the statements concerning the O. I. C. hogs are statements of opinion and not of fact. Where a statement is susceptible of being construed either as a statement of fact or a statement of opinion and owing to the representor's remissness or fraud in hiding his meaning under ambiguous or ambidextrous phraseology, it is impossible to say with cer-

tainty which is the proper construction, every intendment is made *contra preferentem*, and the statement is deemed one of fact. Now this is especially true in the case where the facts concerning which the representation is made are not equally well known to both parties. Thus where a professional water finder stated, apparently as a fact, that water could be found at a certain depth, the construction was taken by the court of the phrase that it was a statement of fact. *Pritty v. Child*, (1902), 71 L. J. K. B. 512, 513, 514.

Now the agents of the petitioner, and especially Carl Silver, and The O. I. C. Swine Breeders' Association knew at all the times when their representations were made what was the true history of the O. I. C. hogs and whether they were less susceptible to hog cholera, foot and mouth and other contagious diseases, and whether other material representations, made to induce purchasers to buy from the petitioner rather than from its competitors, were true. Purchasers from the petitioner, especially farmers, stock raisers, etc. either do not know the real facts or do not know them equally as well as the agents of the petitioner. The statements are such as to which *prima facie* the vendors know everything and the purchasers know nothing. The result of such statements made in the manner and with the positiveness characteristic of the petitioner's publications amounts, as shown by the testimony, to unfair competition.

And this leads to that other proposition of law concerning puffing. Mere puffing perhaps is not within the condemnation of the courts so far as unfair competition is concerned. But where a competitor falsely attributes to his articles qualities which they have not this is unfair competition.

Lyne v. Nicholls, 23 Times Law 86, is authority on this point. The plaintiff and defendant were the owners of newspapers circulating in the same locality, and the defendant published the false statement that the "circulation of" his newspaper "is 20 to 1 of any other weekly paper" in the district; and

"where others count by the dozen, we count by the hundred." Held that the statements were not a mere puff by the defendant of his newspaper, but amounted to an untrue disparagement of the plaintiff's newspaper, and were actionable on proof of actual damage, but that as no damage was proved, the action failed.

The doctrine in respect of the latitude which is accorded to a merchant in commending or puffing his goods has no application to false representations of material facts which are in their nature calculated to deceive and are made with the intent to deceive. *Harris v. Rosenberger*, 145 Fed. 449, 455.

V. TESTIMONY OF GOVERNMENT'S EXPERTS ON CONTAGIOUS DISEASES NOT HEARSAY.

In closing a word may be said about the testimony of Dr. Marion Dorset (page 456 of the Record) and Dr. U. G. Houck (page 540 of the Record) two United States Government experts on contagious hog diseases, and the Ohio State Veterinary, Dr. T. A. Burnett, (page 1489 of the Record) as to their competency to testify on the subject of the existence of cholera, tuberculosis, foot and mouth and other contagious diseases in the petitioner's locality and the nature and symptoms of those diseases and the misleading statements appearing in the advertisements of the petitioner concerning those diseases.

"Marion Dorset, Washington, D. C., is Chief of the Bio-Chemic Division Bureau of Animal Industry, Department of Agriculture; educated in the common and high schools at Columbia, Tennessee; graduated from the University of Tennessee with the degree of B. S. Studies at the University of Pennsylvania. Completed his education at the Columbian university, receiving the degree of M. D. Did post graduate work in the Columbian university in chemistry and bacteriology. Holds the degree of D. V. M. from the Iowa State

College. Been connected with the Department of Agriculture for nearly twenty-six years. His work has been almost wholly research work since he has been in the Department along the lines principally of animal diseases. Almost from the time he entered the Department in 1894 he has been engaged in the study of hog cholera and other hog diseases. At the beginning he was an assistant in the work and he has been since 1904 directing all of the research work on hog cholera and other swine diseases conducted by the Department of Agriculture. Was engaged on study and research with reference to discovering the cause of hog cholera from 1894 until 1905, at which time the true cause of hog cholera was discovered by witness and his associates in the Department. (p. 459.)

"Dr. Ulysses Grant Houck, Chief of the Division of Hog Cholera Control, Bureau of Animal Industry, Department of Agriculture, has been in the service of the Bureau of Animal Industry since January 4, 1897, and has been chief of the Division of Hog Cholera Control since April, 1919. Graduate of the University of Pennsylvania with the degree of B. S. and V. M. D. (p. 543). Says he went to 22 other states in which the disease appeared going from state to state, including Ohio. Then he was called into Washington to assist in the executive features of the work in April, 1917, and then in April of last year he took charge of this Division of Hog Cholera Control.

"Theodore A. Burnett, State Veterinary since 1916. Has control of contagious diseases of animals as a part of his professional duties. It is part of the function of his office as State Veterinarian to keep a record of the existence of hog cholera, tuberculosis, foot and mouth disease and other contagious diseases in the State of Ohio. Those records

are made up from reports of contagious diseases from the local veterinarians and from the field force of veterinarians. (1490) There are state regulations requiring the local veterinarians to report to the State Veterinarian outbreaks of contagious diseases of any kind. Then his office sends field men out to investigate that disease. They go into the vicinity and try to diagnose the case as near as they can. They are likely to hold post mortem examinations to help in that diagnosis. Then the reports are sent in to witness' office and kept on file.

Witness says he has had no cases of foot and mouth disease since he has been State Veterinarian, but has had cases of hog cholera throughout the state and that he has had cases of hog cholera in and around Columbiana County. Witness has reports from Columbiana Co. in his office from Dr. McCandless and one of his field veterinarians, Drs. Maxwell, and Dr. Johnson. (1492)

It will be noticed that none of these three experts ever visited Columbiana County and Mahoning County, Ohio, the locality in which the petitioner claims there has been no hog cholera, tuberculosis, foot and mouth and other contagious diseases, in over 50 years but that all three of them claimed that such a locality could not be without these diseases without their having heard of it and the latter one says he has reports from local interests and his own field men that there has been one or more such diseases in Columbiana County. In the face of the testimony of these three experts alone the advertisements of the petitioner should be deemed to be false and misleading. In a similar case in the U. S. Supreme Court, involving similar testimony of the predecessors in office of Drs. Dorset and Houck, the same view was taken. We quote from *Grayson v. Lynch*, 163 U. S. 468, sec. 480.

"5. Fourteen assignments of error are addressed to the admission of the depositions of Salmon and Detmers, who testified as experts to the nature and symptoms of the disease, and to the fact that there were certain districts infected with the fever. Salmon resided in Washington, was a professor of veterinary medicine, chief of the United States Bureau of Animal Industry, and at the time in the service of the United States government. He had held this position for more than ten years; had been chief of the veterinary division of the Department of Agriculture; had been in the employ of the Department of Agriculture, investigating the diseases of animals, for over fifteen years, and was called to Washington about 1883 in the discharge of his duties. He had investigated the disease known as the Texas fever. Detmers resided in Illinois, was a veterinary surgeon, and had been in the employ of the Department of Agriculture for the purpose of investigating contagious, infectious and epizootic diseases of horses, cattle and swine, and had investigated the disease known as Texas fever, and was acquainted with its symptoms and diagnosis; had made a good many post mortem examinations of cattle that had died with it, and was familiar with the disease. If these gentlemen, who were connected with the Department of Agriculture and made a specialty of investigating animal diseases, were not competent to speak upon the subject as experts, it would probably be impossible to obtain the testimony of witnesses who were. The fact that they spoke of certain districts of Texas as being infected with that disease was perfectly competent, though they may never have visited those districts in person. In the nature of their business, in the correspondence of the department and in the investigation of such diseases, they would

naturally become much better acquainted with the districts where such diseases originated or were prevalent, than if they had been merely local physicians and testified as to what came within their personal observation. The knowledge thus gained cannot properly be spoken of as hearsay, since it was a part of their official duty to obtain such knowledge, and learn where such diseases originated or were prevalent and how they became disseminated throughout the country. *Spring Co. v. Edgar*, 99 U. S. 645; *State v. Wood*, 53 N. H. 484; *Dole v. Johnson*, 50 N. H. 452; *Emerson v. Lowell Gas Light Co.*, 6 Allen, 148. While it is possible that some questions may have been asked of these witnesses which were irrelevant, immaterial and incompetent, the reception of such evidence, as already observed, does not vitiate the findings of the court, or entitled the party to a new trial."

It is respectfully submitted that the Commission's order should be affirmed.

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